110

Supreme Court, U.S.
FILED

No. 08-___08-603 NOV 3 - 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

PETITION FOR WRIT OF CERTIORARI

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The federal Medicaid program requires states to seek reimbursement of Medicaid payments under certain circumstances. Minnesota Statutes section 256B.15, subdivisions 1a and 2, provide, in part, for recovery from the estate of the Medicaid recipient's surviving spouse, upon that spouse's death. If the surviving spouse did not receive Medicaid benefits, recovery is limited to the value of assets that were marital property or jointly held at any point during the marriage. Such assets include any property that was transferred by the Medicaid recipient to the spouse.

In 2007, the U.S. Secretary of Health and Human Services approved amendments to Minnesota's State Medicaid Plan. The amendments expressly incorporated these spousal recovery provisions. The Minnesota Supreme Court, however, held that the provisions are preempted by 42 U.S.C. § 1396p(b)(4)(B) to the extent they reach assets that the recipient spouse transferred to the surviving spouse before death.

The question presented is:

Does 42 U.S.C. § 1396p(b)(4)(B) preempt a state law that requires recovery of Medicaid benefits from the value of assets in a surviving spouse's probate estate regardless of which spouse formally owned those assets when the recipient spouse died?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	6
REASONS FOR GRANTING THE PETITION	19
I. THE MINNESOTA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH INTERPRETATIONS BY THE SECRETARY OF HEALTH AND HUMAN SERVICES AND BY THE NORTH DAKOTA SUPREME COURT	19
A. The Decision Below Conflicts With The Secretary's Approval Of Minnesota's State Medicaid Plan	19
B. The Minnesota Supreme Court's Decision Directly Conflicts With The North Dakota Supreme Court's *Wirtz* Decision	24
II. THE MINNESOTA SUPREME COURT MISCONSTRUED FEDERAL LAW	25

TABLE OF CONTENTS – Continued

Page

III. WHETHER FEDERAL LAW LIMITS SPOUSAL RECOVERY IS AN IMPORTANT QUESTION BECAUSE OF ITS IMPACT ON STATE MEDICAID PROGRAMS 28

A. Limiting Recovery From Spousal Assets Significantly Affects Benefit Recovery 28

B. The Scope Of Spousal Recovery Under Medicaid Is A Question Important To All States 31

CONCLUSION 34

APPENDIX

In re Estate of Barg, 752 N.W.2d 52 (Minn. 2008) 1a

In re Estate of Barg, "Order and Memorandum," No. PX-04-0701 (Minn. Dist. Ct., 7th Dist., Nov. 2, 2005) 46a

In re Estate of Barg, 722 N.W.2d 492 (Minn. Ct. App. 2006) 52a

In re Estate of Barg, Order Denying Reh'g, No. A05-2346 (Minn. July 21, 2008) 65a

Constitution of the United States, Article I, Section 8 ..... 67a

United States Code, Title 42, Ch. 7, subch. XIX §§ 1396, 1396a, 1396d, 1396p, 1396r-5 ..... 68a

TABLE OF CONTENTS – Continued

Page

Minnesota Statutes, Ch. 256B, § 256B.15.....87a

Centers for Medicare & Medicaid Services, U.S. Dep't of Health & Human Services, Transmittal No. 07-005 (June 27, 2007).....89a

TABLE OF AUTHORITIES

Page

CASES

Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006) 33

Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 28

Atkins v. Rivera, 477 U.S. 154 (1986) 8

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 28

Citizens Action League v. Kizer, 887 F.2d 1003 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) 12

Harris v. McRae, 448 U.S. 297 (1980) 8

Hines v. Dep't of Pub. Aid, 850 N.E.2d 148 (Ill. 2006) 31

In re Estate of Budney, 541 N.W.2d 245 (Wis. Ct. App. 1995) 32

In re Estate of Davis, 442 N.E.2d 1227 (N.Y. 1982) 11, 33

In re Estate of Eggert, 72 N.W.2d 360 (Minn. 1955) 5, 13

In re Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002) 15

In re Estate of Paulson, 72 N.W.2d 857 (Minn. 1955) 13

In re Estate of Smith, 2006 WL 3114250 (Tenn. Ct. App. 2006) 31

TABLE OF AUTHORITIES – Continued

Page

In re Estate of Thompson, 586 N.W. 2d 847 (N.D. 1998) 24

In re Estate of Turner, 391 N.W.2d 767 (Minn. 1986) 13

In re Estate of Wirtz, 607 N.W.2d 882 (N.D. 2000) 18, 19, 24, 25, 30

Kizer v. Hanna, 767 P.2d 679 (Cal. 1989) 11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 28

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 9, 27

West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007) 21, 29

West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281 (4th Cir. 2002) 21, 29

Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002) 9, 20, 21, 27, 33

STATUTES

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2403(b) 1

42 U.S.C. § 1396 ..... 2, 9, 20

42 U.S.C. § 1396a(a) 21

42 U.S.C. § 1396a(a)(17)(D) 27

42 U.S.C. § 1396a(a)(18) 3, 16

42 U.S.C. § 1396a(b) 16, 22

42 U.S.C. § 1396c 21

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396p(a) 33
42 U.S.C. § 1396p(b)(1) 10, 12
42 U.S.C. § 1396p(b)(2) 3, 10
42 U.S.C. § 1396p(b)(4) ..... *passim*
42 U.S.C. § 1396p(c)(1)(A) 27
42 U.S.C. § 1396p(d)(2)(A)(ii) 27
42 U.S.C. § 1396p(e)(1) 3, 13, 18, 26
42 U.S.C. § 1396r-5(c)(2)(A) 27
Cal. Welf. & Inst. Code § 14009.5 31
Idaho Code Ann. § 56-218 31
Ind. Code § 12-15-9-1 31
Iowa Code § 249A.5 31
Kan. Stat. Ann. § 39-709 31
Minn. Stat. § 256B.15 ..... 14, 17
Mo. Rev. Stat. § 473.399 31
N.D. Cent. Code § 50-24.1-07 31
Ohio Rev. Code § 5111.11 31
Ohio Rev. Code § 5111.111 31
Or. Rev. Stat. § 414.105 31
S.D. Codified Laws § 28-6-23 31
Wyo. Stat. Ann. § 42-4-206 31

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, Cl. 1 2

OTHER AUTHORITIES

42 C.F.R. § 430.15 22

Act of June 5, 2003, ch. 14, art. 12; 2003 Minn. Laws (1st Sp. Sess.) 1751 14

Am. Ass'n Ret. Pers., *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* (2005) 32

Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Medicaid Data Compendium (2007) 32

Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., State Medicaid Manual § 13025 21-22

Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., *Transmittal and Notice of Approval of State Plan Material*, Transmittal No. 07-005 (June, 27, 2007) 15

General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs* (1989) 10, 11, 12, 29

H. R. Rep. No. 100-105; *reprinted in* 1988 U.S.C.C.A.N. 857 (1988) 9

TABLE OF AUTHORITIES – Continued

Page

Idaho Medicaid State Plan, Transmittal No. 01-006. Attachment 4.17-A (approved Jul. 13, 2001) 23

Indiana State Medicaid Plan, Transmittal No. 05-012, Attachment 4.17-A (approved Mar. 10, 2006) 23

North Dakota State Medicaid Plan, Transmittal No. 95-016, Attachment 4.17-A (approved Dec. 12, 1995) 23

Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 ..... 12, 26

Or. Admin. R. 461-135-0832 31

Oregon Secretary of State, *Notice of Proposed Rulemaking Hearing*, Jan. 24, 2008 30

Oregon State Medicaid Plan, Transmittal No. 02-01, Attachment 4.17-A (approved April 17, 2002) 23

S. Rep. No. 97-494; *reprinted in* 1982 U.S.C.C.A.N. 781 (1982) 8

Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) 8

Thomas D. Begley Jr., *Medicaid Planning for Married Couples*, 17 Nat'l Acad. Elder Law Att'ys Q. 19 (2004) 29

U.S. Dep't Health & Human Servs., *Policy Brief: Medicaid Estate Recovery Collections* (2005) 10, 11

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Health & Human Servs., *Issues in Medicaid Estate Recoveries: A Report to the United States Congress* (1989)..... 10, 11, 12

Wesley E. Wright, et al., *Planning Effectively To Cope With Medicaid Estate Recovery*, 32 Est. Plan. 20 (2005).....29

PETITION FOR WRIT OF CERTIORARI

Leo Vos, Director of the Mille Lacs County, Minnesota, Family Services and Welfare Department, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case. The State of Minnesota supports this petition.[1]

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported as *In re Estate of Barg* at 752 N.W.2d 52 (Minn.). App. 1a. The opinion of the Minnesota Court of Appeals is reported at 722 N.W.2d 492. App. 52a. The opinion of the district court is unpublished. App. 46a.

JURISDICTION

The Minnesota Supreme Court issued its opinion May 30, 2008. App. 1a. Petitioner filed a timely

[1] Contemporaneous with this Petition, the State of Minnesota, by and through its Commissioner of Human Services, Cal R. Ludeman, filed a motion to intervene based upon 28 U.S.C. § 2403(b) providing that a state shall be allowed to intervene as a party in cases involving the validity of a state law when a state-level entity is not already a party. Commissioner Ludeman participated as *amicus curiae* in this case before the Minnesota Court of Appeals and the Minnesota Supreme Court. The State's intervention is conditioned on the Court granting certiorari.

motion for rehearing, which was denied by an order filed July 21, 2008. App. 65a. On October 7, 2008, Justice Alito granted Petitioner's motion to extend the deadline for filing this petition to November 3, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 1, of the United States Constitution (the "Spending Clause") authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. App. 67a. The federal Medicaid laws involved in this case are based upon Congress's Spending Clause power.

42 U.S.C. § 1396 (2000 & Supp. V 2005) provides that:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish medical assistance * * * there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by

> the Secretary, State plans for medical assistance.

App. 68a.

42 U.S.C. § 1396a(a)(18) (2000 & Supp. V 2005) provides that:

> A State plan for medical assistance must –
>
> * * *
>
> (18) comply with the provisions of section 1396p of this title with respect to * * * recoveries of medical assistance correctly paid
>
> * * *

App. 69a.

42 U.S.C. § 1396p(b)(1), (b)(2), (b)(4), and (e)(1) (2000 & Supp. V 2005) provide, in relevant part:

> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> * * *
>
> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate

* * *

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any

* * *

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual –

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State * * * any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

* * *

(e) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and

> resources of the individual and of the individual's spouse
>
> * * *

App. 70a-83a.

The state Medicaid law involved in this case is based on Minnesota's inherent powers to provide for the welfare of its residents and to regulate the descent and distribution of property. *See In re Estate of Eggert*, 72 N.W.2d 360, 361-62 (Minn. 1955). Minnesota Statutes, section 256B.15 (2006) provides that:

> * * *
>
> **Subd. 1a. Estates subject to claims.** If a person receives any medical assistance hereunder, on the person's death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, * * * the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse
>
> * * *
>
> **Subd. 2. Limitations on claims.** * * * A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital

property or jointly owned property at any time during the marriage.

* * *

App. 87a-88a.

STATEMENT

This case is about the most common strategy for sheltering assets so that they can be passed on to heirs instead of being recovered by states to decrease Medicaid costs. It involves the transfer of marital assets from the spouse who is institutionalized and applying for or receiving Medicaid (the "recipient spouse") to the healthy spouse (the "nonrecipient spouse"). Usually, as in this case, the home is the most significant asset that is transferred. Such a transfer changes the formal ownership of an asset. The recipient spouse's lack of formal ownership is then used, like in this case, as grounds for refusing to fully satisfy the Medicaid benefit recovery claim that is made after both spouses have died. The result is that a couple's heirs receive a windfall at the expense of fewer funds being reimbursed to Medicaid.

The Stipulated Facts

In 1962 and 1967, husband and wife Francis and Dolores Barg obtained homestead property in Princeton, Minnesota. App. 2a. They acquired and continued to hold the property as joint tenants with the right of survivorship. *Id.*

In December 2001, Dolores applied for and began receiving Medicaid long-term care benefits. App. 3a. The marital homestead was their only significant asset. *See id.* Its value, however, was excluded for purposes of determining Dolores' Medicaid eligibility because Francis continued living there. *Id.* Seven months later, their daughter executed a guardian's deed conveying the home solely to Francis. App. 3a. Dolores' name was also removed as an owner on the couple's bank accounts. App. 3a-4a.

When Dolores died in January 2004, she had received $108,413.53 in Medicaid benefits from the state. App. 4a. Six months later, Francis died. *Id.* He did not receive Medicaid benefits. *Id.*

Francis left a solvent estate with assets totaling $146,446.29. App. 4a. One of these assets was the couple's home valued at $120,800.00. *Id.* All other assets in Francis' estate were also either jointly held or traceable to jointly-held assets acquired by Dolores and Francis at some time during their marriage. *Id.*

Petitioner Mille Lacs County filed a claim in Francis' probate estate to recover the full value of Medicaid benefits received by Dolores. Francis' Personal Representative (the couple's son) only partially allowed the claim. App. 4a, 47a. The County petitioned in district court for full allowance. App. 4a. The parties agreed to stipulated facts. App. 46a.

The Personal Representative has contended that federal Medicaid law does not allow Minnesota to seek recovery from Francis' estate for benefits paid on

behalf of Dolores. His alternative position has been that, if a recovery claim is allowed, federal law limits the assets liable to satisfy the claim to those that Dolores owned when she died. The County contends that the scope of required recovery under Minnesota law is consistent with federal Medicaid law.

Medicaid's Cooperative Federalism In Covering Medical Care To The Needy

What is popularly known as "Medicaid" was created as part of the Social Security Act. *Social Security Amendments of 1965*, Pub. L. No. 89-97, 79 Stat. 286 (1965). Medicaid pays for needed medical care for people whose income and resources are insufficient to meet the cost of required care. *See Atkins v. Rivera*, 477 U.S. 154, 156 (1986) (citation omitted). Unlike Social Security and Medicare, which are purely federal programs, Medicaid "is a cooperative endeavor in which the federal government provides financial assistance to participating states to aid them in furnishing health care to needy persons." *Harris v. McRae*, 448 U.S. 297, 308 (1980).

In enacting Medicaid, Congress intended it to be the payment source of *last* resort. Specifically, Congress intended that the resources of a couple, including their home equity, be used for their care, their support, or to defray Medicaid costs. S. Rep. No. 97-494 at 38;, *reprinted in* 1982 U.S.C.C.A.N. 781, 814 (1982). Congress did not intend Medicaid to be used as a way to "facilitate the transfer of accumulated

wealth from nursing home patients to their non-dependent children." H. R. Rep. No. 100-105 at 73; *reprinted in* 1988 U.S.C.C.A.N. 857, 896 (1988). Underlying Congress's intent, is its desire to ensure that sufficient funds remain for future Medicaid recipients, and to lessen the burdens on state and federal taxpayers. *Cf. Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981) ("There are limited resources to spend on welfare.").

As with other Spending Clause-based laws, federal Medicaid payments are accompanied by certain broad conditions in statutes and regulations with which a state must comply in order to receive the federal matching funds. Within this Medicaid statutory and regulatory framework, participating states enact their own state-specific legislation and rules for the administration and implementation of their state programs. Congress intended Medicaid to provide states with flexibility in designing programs to meet each state's needs, and states are given considerable latitude in formulating the terms of their programs. *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002). State laws and policies are then incorporated into State Medicaid Plans, which must be approved by the U.S. Secretary of Health and Human Services before a state may receive federal payments. 42 U.S.C. § 1396.

Medicaid Estate Recovery And Its Important Purposes

"Estate recovery" is the term for the general process by which a state seeks reimbursement, after a Medicaid recipient's death, for Medicaid benefits received. *See* U.S. Dep't of Health & Human Servs., *Issues in Medicaid Estate Recoveries: A Report to the United States Congress*, 1-2 (1989) ("HHS, *Issues in Medicaid Estate Recoveries*"). Generally, recovery only applies to Medicaid recipients who were permanently institutionalized or over age 55. 42 U.S.C. § 1396p(b)(1). Recovery must be delayed until after the death of a surviving spouse and until there are no dependant or disabled children. 42 U.S.C. § 1396p(b)(2). "Spousal recovery" is used to describe recovery that is delayed because of a surviving spouse.

Medicaid estate recovery has a number of important purposes. First, it serves to recycle public funds for other needy people by recovering the value of those funds. *See In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986) (recognizing the reuse of Medicaid funds is "a very important purpose"). Estate recovery is thus an important source of nontax support for Medicaid. HHS, *Issues in Medicaid Estate Recoveries* at 12; General Accounting Office, *Medicaid: Recoveries From Nursing Home Residents' Estates Could Offset Program Costs* 23 (1989) ("GAO, *Medicaid Recoveries*"). In 2004, estate recovery returned $361.7 million to public treasuries. *See* U.S. Dep't Health & Human

Servs., *Policy Brief: Medicaid Estate Recovery Collections* 1 (2005).

Second, estate recovery promotes the public interest over the private interest of heirs. Medicaid funds are returned for public use and heirs do not unfairly benefit by receiving assets that were protected from depletion by Medicaid. *Kizer v. Hanna*, 767 P.2d 679, 681-82 (Cal. 1989); *In re Estate of Davis*, 442 N.E.2d 1227, 1229 (N.Y. 1982) (noting that disappointed nondependent heirs are the real party in interest opposing estate recovery).

Third, estate recovery helps contain Medicaid's costs of providing long-term care to the elderly. The use of estate recovery encourages the use of private long-term care insurance rather than solely relying on Medicaid. HHS, *Issues In Medicaid Estate Recoveries* 3. In the same vein, estate recovery is the "logical extension" of other Medicaid laws that prevent couples from transferring their assets to others, known as "voluntary impoverishment," in order to qualify for Medicaid earlier instead of using those assets to pay for their care. GAO, *Medicaid Recoveries* 5.

Fourth, spousal recovery specifically balances the interests of the state and those of the couple. During their lifetimes, Medicaid pays for the care of the sick spouse and many of the couple's assets can still be used to support the nonrecipient spouse living in the community. Recovery is delayed until after both spouses have died and their assets are no longer needed for their care or support. In return for

Medicaid's long-term care coverage, the couple's remaining assets, if any, can be used to reimburse Medicaid before going to heirs.

Congress's 1993 Amendments Expand Medicaid Estate Recovery

A series of reports in the late 1980s identified estate recovery as an underutilized means of offsetting Medicaid costs. *See, e.g.*, GAO, *Medicaid Recoveries*; HHS, *Issues In Medicaid Estate Recoveries*. At about the same time, though, the Ninth Circuit limited the ability of already-active state estate recovery programs to use estate recovery when it narrowly interpreted then-existing federal law. *Citizens Action League v. Kizer*, 887 F.2d 1003, 1006 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990). As a result of these events, Congress substantially expanded Medicaid estate recovery through amendments in the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"). Pub. L. No. 103-66, § 13612 (amending 42 U.S.C. § 1396p(b)). Before, estate recovery had simply been permitted. OBRA 1993, however, required that states seek recovery "from the individual's estate" in the case of Medicaid recipients age 55 and over. 42 U.S.C. § 1396p(b)(1)(B).

Congress also included in the OBRA 1993 amendments the provision at issue in this case. Subsection 1396p(b)(4)(A) mandates that, for recovery purposes, the term "estate" "shall include all real and personal property and other assets included within

the individual's estate, as defined for purposes of State probate law." Subsection 1396p(b)(4)(B) then provides that the term "estate"

> may include, at the option of the State * * * any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(emphasis added.) OBRA 1993 also provided that "[t]he term 'assets,' with respect to an individual, includes all income and resources of the individual *and of the individual's spouse* * * *." 42 U.S.C. § 1396p(e)(1) (emphasis added).

Minnesota's History Of Spousal Recovery

Minnesota has had public welfare estate recovery laws since at least 1929, when it began offering old age assistance. *See In re Estate of Paulson*, 72 N.W.2d 857, 858-59 (Minn. 1955). These laws were broad and allowed recovery from assets in the estate of one spouse of the value of benefits received by the other. *See In re Estate of Eggert*, 72 N.W.2d 360, 362 (Minn. 1955). Minnesota's Medicaid estate recovery law dates from 1967 when Minnesota began participating in Medicaid. *Turner*, 391 N.W.2d at 768.

Since 1987, Minnesota Medicaid law has expressly required recovery from the probate estates of surviving spouses. Minn. Stat. § 256B.15, subd. 1a (2006). Section 256B.15 requires filing a claim for recovery from the probate estate of the last surviving spouse, regardless of whether that spouse was the Medicaid recipient. *Id.* The state's claim, however, is limited "to the value of the assets of the estate that were marital property or jointly owned property *at any time* during the marriage." Minn. Stat. § 256B.15, subd. 2 (emphasis added).[2]

District Court And Court of Appeals Holdings

Both the district court and the court of appeals held that recovery on the county's claim was allowed.

---

[2] In 2003, Minnesota added a number of provisions to section 256B.15. *See* Act of June 5, 2003, ch. 14, art. 12 §§ 40-52, 90; 2003 Minn. Laws (1st Sp. Sess.) 1751, 2205-18, 2250-51 (codified at Minn. Stat. § 256B.15, subds. 1, 1c to 1k (2006)). These provisions ensure that a joint tenancy or life estate interest held by a Medicaid recipient will be subject to recovery after the recipient's death. It ensures recovery by bringing these interests into probate rather than allowing them to pass outside of probate. The provisions address situations when the other co-owners or remaindermen are not a recipient's spouse.

The spousal recovery provisions at issue here were generally unaffected by the 2003 amendments. Spousal recovery is from a spouse's probate estate and does not rely on capturing nonprobate assets. Both parties agreed that the 2003 amendments do not apply here. Appellant's Supp. Br. at 2; Respondent's Supp. Br. at 2. The court below discussed those amendments and also concluded that they do not apply. App. 40a-43a.

These holdings were based on the conclusion that Dolores' transfer of her interest in the homestead to Francis' qualified as an "other arrangement" under § 1396p(b)(4)(B). App. 49a and 62a. Both courts, however, limited the scope of recovery based on the court of appeals' earlier decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). *Gullberg* had held that state law was partially preempted by § 1396p(b)(4)(B) to the extent the law required recovery beyond the recipient's interest in an asset at the time of death. *Id.* at 714. Thus, both the district court and the court of appeals relied on federal law to deny full recovery on the claim.

The Minnesota Supreme Court granted the County's request for discretionary review of the court of appeals' decision. It also granted the Personal Representative's conditional request for review of the question of whether federal law prohibited any recovery from a nonrecipient spouse's probate estate.

The Secretary of Health and Human Services' Approval of Minnesota's Spousal Recovery Provisions As Part of Its Medicaid State Plan

On June 27, 2007, the Secretary of the U.S. Department of Health and Human Services, acting through the Centers for Medicare and Medicaid Services, approved an amendment to Minnesota's state Medicaid plan that incorporated the spousal recovery provisions at issue in this case. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

Human Servs., *Transmittal and Notice of Approval of State Plan Material*, Transmittal No. 07-005 (June, 27, 2007). App. 90a. This approval is based upon the determination that the estate recovery provisions comply with federal Medicaid statutory conditions. 42 U.S.C. §§ 1396a(b) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section"); 1396a(a)(18) (incorporating condition of compliance with terms of § 1396p).

The approved state plan amendment incorporated the substance of Minnesota's spousal recovery laws and explained how the state applied those laws. As amended, the state plan provides that Minnesota recovers from the estates of surviving nonrecipient spouses. It then explains that "[a]ny assets, proceeds of assets and income from such assets, that were jointly owned property at any time during the marriage or marital property including all property *in which either spouse had an interest at the time of marriage and property acquired by either or both during the marriage, regardless of how acquired, titled or owned are subject to recovery*." App. 93a (emphasis added).

Soon after the Secretary issued his approval of the state plan amendment, the Minnesota Commissioner of Human Services, as *amicus curiae*, submitted it to the Minnesota Supreme Court. Minn. Comm'r of Human Servs., Supp. Authority Submission, July 9, 2007.

The Minnesota Supreme Court's Opinion

On May 30, 2008, the Minnesota Supreme Court issued its opinion, affirming the court of appeals in part and reversing the court of appeals in part.

The Minnesota Supreme Court first rejected the Personal Representative's contention that federal law bars *any* recovery from a surviving spouse's probate estate, and therefore preempts Minnesota law. App. 30a. After finding that other courts "are split on the question," the court concluded that the federal statute was sufficiently ambiguous that the presumption against preemption militated in favor of upholding state laws authorizing spousal recovery. App. 29a-30a.

The court then addressed the following question: "does federal law limit the [spousal] recovery to assets in which the recipient had an interest at the time of her death, preempting the broader recovery allowed in Minn. Stat. § 256B.15, subd. 2, as to assets owned as marital property or in joint tenancy at any time during the marriage?" App. 17a. The court answered the question yes. It held that federal law preempts Minnesota from seeking recovery from spousal assets unless the recipient spouse had a formal ownership interest in the asset at the time of death. App. 37a.

The court purported to rely on the plain language of § 1396p(b)(4)(B)(2), finding that the provision limits recovery to "assets in which the individual" – *i.e.*, the recipient spouse – "had any legal title or interest in at the time of death." App. 37a. In the

court's view, assets transferred by the recipient spouse before her death were exempt from Medicaid estate recovery claims. The court made no mention of § 1396p(e)(1), establishing the meaning of "[t]he term 'assets,' with respect to an individual, [to] include[ ] all income and resources of the individual *and of the individual's spouse*, * * *." (emphasis added). Nor did the court make any reference to the Secretary's approval of Minnesota's state Medicaid plan.

The court disagreed with the decision by the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The North Dakota court had held in *Wirtz* that federal law did *not* prohibit states from recovering from marital assets that had been transferred between spouses before the recipient's death. App. 33a-34a. The Minnesota court rejected *Wirtz*'s conclusion that such lifetime transfers constituted an "other arrangement" under 42 U.S.C. § 1396p(b)(4)(B). App. 34a.

Finally, the court applied its legal holdings to the facts and concluded that Dolores did not have an interest in the homestead or bank accounts at the time of her death because those assets had already been transferred to Francis. App. 43a. Consequently, the court held that the County was precluded from requiring satisfaction of its claim from those assets.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition to address the irreconcilable conflict between the Minnesota Supreme Court's decision and the Secretary's interpretation of § 1396p(b)(4)(B). Granting this Petition is also necessary to resolve the conflict with the North Dakota Supreme Court's decision in *Wirtz*. The scope of Medicaid estate recovery is an important question, affecting the administration of the Medicaid program by both the federal and state governments, federal and state budgets, and potentially millions of elderly Medicaid recipients. A grant of certiorari is warranted.

I. THE MINNESOTA SUPREME COURT'S DECISION DIRECTLY CONFLICTS WITH INTERPRETATIONS BY THE SECRETARY OF HEALTH AND HUMAN SERVICES AND BY THE NORTH DAKOTA SUPREME COURT.

A. The Decision Below Conflicts With The Secretary's Approval Of Minnesota's State Medicaid Plan.

1. The Minnesota Supreme Court's holding irreconcilably conflicts with the Secretary's interpretation and state plan approval. Minnesota's approved state plan provides that recovery applies to the "full value of all assets" in the nonrecipient spouse's probate estate that were the property of *either* spouse during their marriage. App. 93a. The court, however, held that Minnesota law was preempted because

"federal law clearly limits [recovery] to assets in which *the recipient* had an interest at the time of her death." App. 37a (emphasis added). However, this conclusion is directly contrary to how the Secretary has interpreted federal law. *See* App. 93a.

In applying its holding, the court below concluded that the Bargs' marital homestead was not subject to recovery because Dolores had transferred her interest to Francis before her death. App. 43a. Applying the Secretary's interpretation, reflected in his approval of the state plan, leads to the opposite conclusion.

Minnesota's approved spousal recovery provisions prevent the sheltering of assets from recovery by simply changing the name on the asset before the recipient dies. The decision below allows and encourages such sheltering – at public expense.

2. This conflict between the decision below and the Secretary's interpretation is significant. Congress has delegated to the Secretary substantial authority and responsibility for administering Medicaid and determining state compliance with Medicaid's statutory conditions.[3] 42 U.S.C. § 1396 (making payment of federal Medicaid funds to states contingent upon the Secretary's approval of state plans). Indeed, the Court

---

[3] The Secretary has delegated Medicaid oversight to the Centers for Medicare and Medicaid Services within the Department of Health and Human Services. *See Blumer*, 534 U.S. at 479 n.1. Reference will nevertheless be made to the Secretary as the administrative and interpretive authority. *See id.*

has "long noted Congress'[s] delegation of extremely broad regulatory authority to the Secretary in the Medicaid area." *Blumer*, 534 U.S. at 497 n.13.

Congress specifically vested the Secretary with authority to enforce Medicaid conditions on states. 42 U.S.C. § 1396c. If the Secretary finds that a state plan does not comply with Medicaid conditions, or that the plan is administered in a way that results in "a failure to comply substantially" with any condition, the Secretary has authority to enforce the Medicaid statute by ending or limiting federal matching payments until there is compliance. *Id.*; *see, e.g., West Virginia v. Thompson*, 475 F.3d 204, 208 n.1 (4th Cir. 2007) ("*West Virginia II*") (recounting history of compliance efforts directed toward West Virginia regarding estate recovery).

The submission and approval of a state plan or state plan amendment, as in this case, is not a meaningless or symbolic act. The state plan is the key document defining the federal-state relationship. 42 U.S.C. § 1396a(a); *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 284 (4th Cir. 2002) ("*West Virginia I*"). It is "a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with [federal Medicaid requirements]. The [s]tate plan contains all information necessary for the Department [of Health and Human Services] to determine whether the plan can be approved." Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

Human Servs., State Medicaid Manual § 13025. Congress has directed that the Secretary "shall approve" any plan or amendment to a plan that complies with federal law. 42 U.S.C. § 1396a(b).

In light of the significant role of the state plan in the state-federal relationship, and as the primary means of ensuring compliance with Medicaid laws, the Secretary exercises rigorous oversight. State plans and amendments are evaluated by applying the same Medicaid statutes a court would apply to verify compliance with the federal conditions. 42 C.F.R. § 430.15(a)(1) ("Determinations as to whether State plans (including plan amendments and administrative practice under plans) originally meet or continue to meet the requirements for approval are based on relevant Federal statutes and regulations."). Approval of a state plan amendment is the Secretary's determination that a state has complied with the conditions imposed by federal Medicaid laws.

3. The conflict between the decision below and the Secretary's interpretation is also significant because the application of the Secretary's interpretation is not limited to Minnesota's state plan. The Secretary has applied that interpretation in approving at least four other state plans that expressly include spousal recovery provisions. Two of those state plans, North Dakota's and Oregon's, simply state that the surviving spouse's probate estate is subject to recovery claims without imposing a limit on

what assets are subject to recovery.[4] The other two state plans, Idaho's and Indiana's, state that a surviving spouse's probate estate is liable for recovery but, like Minnesota, place some limit on the recoverable assets – e.g., excluding assets attributable to a spouse's remarriage.[5] Of course, other states also have a significant interest in knowing the permissible scope of spousal recovery as they may consider available options under federal law.

---

[4] North Dakota State Medicaid Plan, Transmittal No. 95-016, Attachment 4.17-A (approved Dec. 12, 1995) (stating "North Dakota defines the estate as those assets which are, under state law, that part of the decedent's probate estate or that part of the decedent's surviving spouse's probate estate which is subject to the claims of creditors."); Oregon State Medicaid Plan, Transmittal No. 02-01, Attachment 4.17-A (approved April 17, 2002) (stating that "estate is defined as all real and personal property and other assets included within the individual's, or the individual's surviving spouse's, probatable estate.").

[5] Indiana State Medicaid Plan, Transmittal No. 05-012, Attachment 4.17-A (approved Mar. 10, 2006) (stating that "[a]ssets included in the estate of the Medicaid recipient's surviving spouse are included after the death of the surviving spouse. If the surviving spouse has remarried, assets that are attributable to the surviving spouse's subsequent spouse are not included); Idaho Medicaid State Plan, Transmittal No. 01-006, Attachment 4.17-A (approved Jul. 13, 2001) (stating that "[a] claim against the estate of a surviving spouse of a predeceased recipient is limited to the value of the assets of the estate that were community property, or the deceased recipient's share of the separate property, and jointly owned property."). The Minnesota Commissioner of Human Services included copies of the relevant sections of the North Dakota, Indiana, and Idaho state Medicaid plans with his *amicus curiae* brief below. Minn. Comm'r of Human Services' Amicus Curiae Br., App'x 4-17.

B. The Minnesota Supreme Court's Decision Directly Conflicts With The North Dakota Supreme Court's *Wirtz* Decision.

The Minnesota Supreme Court's holding on the scope of spousal recovery directly conflicts with the 2000 decision of the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). *Wirtz* considered which assets in a surviving nonrecipient spouse's probate estate were subject to recovery given the definition of "estate" contained in 42 U.S.C. § 1396p(b)(4)(B). The facts in *Wirtz* were the same as the essential facts in *Barg*: one spouse received Medicaid benefits and died leaving no probate estate; the other spouse died later, having received no Medicaid benefits and leaving property in her estate that included former marital property. 607 N.W.2d at 883.

The North Dakota Supreme Court held that marital assets conveyed by the recipient spouse to the nonrecipient spouse during the marriage, but before the recipient's death, are subject to a recovery claim. *Id.* at 885. The court reached that holding after concluding that the terms "interest" and "other arrangement" in § 1396p(b)(4)(B) created ambiguity in the statute's plain language. *Id.* The court then turned to legislative history to identify Congress's intent. Based on its earlier analysis of that intent in *In re Estate of Thompson*, 586 N.W. 2d 847 (N.D. 1998), the North Dakota court concluded that Congress intended to allow states to trace the assets of

recipients and recover from those assets after the recipient's surviving spouse died. 607 N.W.2d at 885.

The Minnesota Supreme Court rejected *Wirtz's* reliance on the phrase "other arrangement" in § 1396p(b)(4)(B). The court concluded that the plain meaning of "other arrangement" is "arrangements other than those expressly listed [in the statute] that also convey assets at the time of the Medicaid recipient's death." App. 34a. Thus, a direct and clear conflict exists between two state supreme courts on the question presented.

II. THE MINNESOTA SUPREME COURT MISCONSTRUED FEDERAL LAW.

The plain language of § 1396p(b)(4)(B) fully supports the Secretary's interpretation and the *Wirtz* holding. It allows a state, "at the option of the State," to go beyond the minimum probate scope or range of recovery. Thus, Congress allowed states to expand the range of recovery to include "any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death." (emphasis added).

Congress, in turn, unambiguously declared that the term "assets," as used throughout § 1396p, "includes all income and resources of the individual *and of the individual's spouse.*" 42 U.S.C. § 1396p(e)(1) (emphasis added). Congress adopted this meaning of "assets" at the same time it adopted § 1396p(b)(4)(B)'s expanded range of recovery option, which uses the

term "assets." OBRA 1993, Pub. L. No. 103-66, § 13611(c) (describing meaning of "assets"); § 13612(c) (adding expanded option), 107 Stat. 312, 626, 628 (1993).

Giving effect to Congress's declared reach of the term "assets" fully supports Minnesota's scope of spousal recovery. When "assets" is used in a provision, Congress expressly expanded the reach of that provision to include the resources of an individual's spouse. Thus, in § 1396p(b)(4)(B) the clause "any * * * assets in which the individual had any legal title or interest" means assets "any * * * assets in which [either or both the individual and the individual's spouse] had any legal title or interest." Minnesota's law seeking recovery from the value of assets in a surviving spouse's probate estate is consistent with the "any * * * other assets" clause.[6]

When this meaning of "assets" is applied to the phrase "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death," it is apparent that the Minnesota Supreme Court's reading of the

---

[6] Consistent with the phrase "at time of death" in § 1396p(b)(4)(B), Minnesota's state Medicaid plan explains that spousal recovery "does not apply to assets attributable to a subsequent spouse when the nonrecipient spouse has remarried, or to assets acquired individually with non-marital assets or interests by the nonrecipient spouse after the death of the recipient spouse." *See* App. 93a.

provision is in error. It makes no sense to speak of "assets *of an individual's spouse* in which the individual had any legal title or interest at the time of death." By including resources of both "the individual" and "of the individual's spouse" in the meaning of "assets," Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B).

Congress's intention here is confirmed by all of the other Medicaid provisions relating to the treatment of spousal assets. Those provisions all allow or require states to consider those resources to be available to pay for the care of the recipient spouse, *regardless* of formal ownership.[7] This Court, too, has recognized what these provisions embody: the "background principle" of Medicaid that spouses are expected to support each other. *Blumer*, 534 U.S. at 494; *see also Schweiker*, 453 U.S. at 47-48 (noting that in Medicaid "Congress treated spouses differently from most other relatives by explicitly authorizing state

---

[7] 42 U.S.C. § 1396a(a)(17)(D) (allowing states to take into account the financial responsibility of a spouse even though states are generally prohibited from considering the responsibility of other relatives); 42 U.S.C. § 1396r-5(c)(2)(A) (requiring that "all the resources held by *either* the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse" for eligibility purposes (emphasis added)); 42 U.S.C. § 1396p(c)(1)(A) (imposing an eligibility penalty for a transfer by *either* spouse of assets at less than fair market value to a third party); and 42 U.S.C. § 1396p(d)(2)(A)(ii) (requiring, for eligibility purposes, the counting of assets in a trust if the trust assets are those of the individual *or those of the individual's spouse*).

plans to 'take into account the financial responsibility' of the spouse.").

Finally, the decision of the Minnesota Supreme Court is inconsistent with the presumption against preemption. That presumption requires "a narrow interpretation" of federal provisions that are claimed to preempt state laws. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[8]

III. WHETHER FEDERAL LAW LIMITS SPOUSAL RECOVERY IS AN IMPORTANT QUESTION BECAUSE OF ITS IMPACT ON STATE MEDICAID PROGRAMS.

A. Limiting Recovery From Spousal Assets Significantly Affects Benefit Recovery.

The Minnesota Supreme Court's decision prohibits recovery from any spousal asset that the recipient spouse transferred before death. This limitation significantly affects benefit recovery by allowing a

---

[8] To the extent the federal statute's language is ambiguous about the scope of spousal recovery claims, there can still be no preemption. An ambiguous condition on states in a Spending Clause-based law is unenforceable. *See Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (stating that Spending Clause statutes must give state officials "clear notice" of the conditions that attach to acceptance of federal funds). Also, the Secretary's approval of Minnesota's state plan warrants deference if the underlying federal statute is ambiguous and the Secretary's construction of the statute is a permissible one. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

couple's most significant asset, their home, to escape recovery. *See West Virginia I*, 289 F.3d at 284-85; *West Virginia II*, 475 F.3d at 207. Indeed, the GAO estimated that recovery from home equity could offset 68% of the Medicaid costs of couples who owned their homes. GAO, *Medicaid Recoveries* at 4.

The Minnesota Supreme Court's holding has the practical effect of encouraging interspousal transfers as a way to shelter assets from being used to pay for long-term care. Consequently, the court's decision validating such transfers as a way to shelter assets will create an additional burden on state and federal taxpayers.

Interspousal transfers are the most common form of Medicaid planning. Wesley E. Wright, et al., *Planning Effectively To Cope With Medicaid Estate Recovery*, 32 Est. Plan. 20, 25 (2005) (stating "Many elder law practitioners defeat estate recovery by capitalizing on exempt transfers under the Medicaid rules."). For example, Medicaid planning practitioners advise that "[t]he home should always be transferred to the community spouse [i.e., the nonrecipient spouse] to avoid Medicaid estate recovery." Thomas D. Begley Jr., *Medicaid Planning for Married Couples*, 17 Nat'l Acad. Elder Law Att'ys Q. 19, 20 (2004). A practitioner also explained the benefit – to a couple's heirs – of this strategy in that "[t]ransfer of the home * * * allows Medicaid coverage to continue for the beneficiary, while removing the home from the beneficiary's estate and thus defeating estate recovery." Wright, *supra* at 25. The same practice was also

described as "an effective means of moving assets out of the Medicaid applicant's name, without jeopardizing Medicaid eligibility, while sheltering those assets against estate recovery." *Id.*

The Minnesota Supreme Court's decision allowing the sheltering of assets has an immediate and direct impact on public resources. The Minnesota Department of Human Services estimates that annual Medicaid benefit recoveries will initially be reduced because of the decision by over $4 million. That estimated annual reduction will increase to over $10 million by 2013. Similarly, before the decision in this case was issued, Oregon estimated that subjecting interspousal transfers to recovery would increase recoveries by $20 million over twenty-four months in that state.[9] Notably, Oregon premised its ability to make such recoveries on *Wirtz* and Minnesota caselaw before the Minnesota Supreme Court's decision in this case.[10]

---

[9] Oregon Secretary of State, *Notice of Proposed Rulemaking Hearing*, Jan. 24, 2008 (available at http://www.dhs.state.or.us/policy/selfsufficiency/publications/01-24-08nprm.pdf) (Last visited October 22, 2008).

[10] *Id.*

B. The Scope Of Spousal Recovery Under Medicaid Is A Question Important To All States.

The scope of spousal recovery under federal law is a matter of widespread importance to those states that use spousal recovery. At least eleven other states have spousal recovery statutes: California,[11] Idaho,[12] Indiana,[13] Iowa,[14] Kansas,[15] Missouri,[16] North Dakota,[17] Ohio,[18] Oregon,[19] South Dakota,[20] and Wyoming.[21] Any limitation on the scope of spousal recovery claims is important to these states because it constrains their present or future practices. Three other states had spousal recovery practices or statutes that were subsequently invalidated by court decisions holding that federal law prohibited recovery claims against a nonrecipient spouse's estate: Illinois,[22] Tennessee,[23]

---

[11] Cal. Welf. & Inst. Code § 14009.5(a) (2008).

[12] Idaho Code Ann. § 56-218 (2008).

[13] Ind. Code § 12-15-9-1 (2008).

[14] Iowa Code § 249A.5 (2007).

[15] Kan. Stat. Ann. § 39-709(g)(2) (2008).

[16] Mo. Rev. Stat. § 473.399 (2008).

[17] N.D. Cent. Code § 50-24.1-07(5) (2008).

[18] Ohio Rev. Code § 5111.11(B)(1) and 5111.111(B) (2008).

[19] Or. Rev. Stat. § 414.105 (2008); Or. Admin. R. 461-135-0832 (2008).

[20] S.D. Codified Laws § 28-6-23 (2008).

[21] Wyo. Stat. Ann. § 42-4-206(c) (2008).

[22] *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006).

[23] *In re Estate of Smith*, 2006 WL 3114250 (Tenn. Ct. App. 2006).

and Wisconsin.[24] Estate recoveries in the twelve states which have opted for spousal recoveries (including Minnesota) account for over 42% of all Medicaid estate recoveries nationwide. *See* Am. Ass'n Ret. Pers., *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* 50 (2005).

The question presented is also important to states that do not currently choose to use spousal recovery. All states are required to seek recovery from assets in individuals' probate estates under § 1396p(b)(4)(A). States may consider expanding the scope of estate recovery efforts to include spousal recovery. 42 U.S.C. § 1396p(b)(4)(B). For example, the Minnesota Department of Human Services understands that its counterpart in Colorado is considering legislative proposals to expand estate recovery to include spousal recovery. Now, however, Colorado and other states are faced with conflicting statements about the scope of spousal recoveries. Such uncertainty may dissuade states from opting for spousal recovery.

Medicaid issues in general and Medicaid estate recovery issues in particular are important nationally. In 2007, six million people were covered by Medicaid in the "aged" category – all of whom may eventually be subject to estate recovery. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health &

---

[24] *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995).

Human Servs., Medicaid Data Compendium 34 (2007). New York's highest court concluded that the large number of elderly enrolled in Medicaid programs make the issue of estate recovery "one of broadsweeping application." *Davis*, 442 N.E.2d at 1228. Further illustration of the national significance of estate recovery issues is the participation as *amicus curiae* below of the National Senior Citizens Law Center, a national advocacy organization based in Washington, D.C., and California.

In addition, the Court has itself recognized the widespread importance of Medicaid questions. It has done so in granting certiorari in Medicaid cases involving long-term care recipients and federal limitations relating to liens on recipient property interests. *Blumer*, decided in 2002, considered whether states could use an "income first" rule in determining the eligibility of institutionalized individuals with spouses. 534 U.S. 473. In its 2006 *Ahlborn* decision, the Court considered whether the provisions in 42 U.S.C. § 1396p(a) limited the scope of a state's lien on personal injury settlements. *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006). This Court's intervention is once again required to ensure the uniform and proper application of the Medicaid program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF THE MINNESOTA ATTORNEY GENERAL
Bremer Tower, Suite 900
445 Minnesota Street
St. Paul, MN 55101-2127
(651) 296-8714

LORI SWANSON
Attorney General

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

Counsel for Petitioner

Dated: November 3, 2008.

APPENDIX

752 N.W.2d 52

Supreme Court of Minnesota.
In re the ESTATE OF Francis E. BARG, a/k/a Francis Edward Barg.
No. A05-2346.

May 30, 2008.
Rehearing Denied July 21, 2008.

Mille Lacs County Attorney, Melissa M. Saterbak, Asst. Mille Lacs County Attorney, Milaca, MN, for appellant Mille Lacs County.

Thomas J. Meinz, Princeton, MN, for respondent Michael Barg.

Julian J. Zweber, St. Paul, MN, for amici curiae Elder Law Section of the Minnesota State Bar Association and National Senior Citizens Law Center.

Lori Swanson, Attorney General, Robin Christopher Vue-Benson, Asst. Attorney General, St. Paul, MN, for amicus curiae Minnesota Commissioner of Human Services.

Heard, considered, and decided by the court en banc.

OPINION

MEYER, Justice.

The Mille Lacs County Family Services and Welfare Department (County) filed a claim against the Estate of Francis E. Barg (Estate), seeking to

recover Medicaid benefits correctly paid on behalf of his predeceased wife, Dolores Barg. The Estate partially allowed the claim, and disallowed the other part. The district court, concluding that Dolores Barg's interest in the couple's property was limited because she had conveyed it to her husband before her death, evaluated her interest as a life estate, and upheld the partial disallowance. The County appealed, arguing that it was entitled to recovery from the full value of the property. The court of appeals reversed and remanded, partially allowing the claim and evaluating Dolores Barg's interest in the property as a joint tenancy interest equivalent to one-half the value of the property. *In re Estate of Barg,* 722 N.W.2d 492, 497 (Minn.App.2006). We affirm in part and reverse in part.

Factual and Procedural Background.

The parties have stipulated to the facts in this case. Dolores J. Barg was born in 1926, married Francis E. Barg in 1948, and remained married to him until her death in 2004. In 1962 and 1967, in two separate transactions, the Bargs took title as joint tenants to real property in Princeton, Minnesota. Their home was located on this property. On October 24, 2001, Dolores Barg entered a nursing home in Mille Lacs County, at first paying the costs herself. In

December 2001, she applied for long-term Medicaid benefits.[1]

An asset assessment for Dolores Barg was completed in February 2002. The Bargs' marital assets including their homestead totaled $137,272.63.[2] Approval for long-term Medicaid benefits was given retroactive to December 1, 2001.

On February 27, 2002, Francis Barg executed his will, nominating the couple's son Michael F. Barg as personal representative, leaving his estate to his surviving descendants, and making no provision for his wife. Dolores Barg transferred her joint tenancy interest in the homestead property to Francis Barg on July 2, 2002, when her daughter and guardian of her estate, Barbara Anderson, executed a Guardian's Deed. Also in July 2002, Barbara Anderson deleted Dolores Barg's name from certificates of deposit the

---

[1] "Medicaid" is the popular name for this cooperative federal-state program. *See* 42 U.S.C. § 1396-1396v (2000). In Minnesota it is referred to as "medical assistance." Minn.Stat. § 256B.02, subd. 8 (2006).

[2] For purposes of determining eligibility of one spouse for Medicaid, the value of a couple's home is excluded. 42 U.S.C. § 1396r-5(c)(2), (5) (2000); 42 U.S.C. § 1382b(a)(1) (2000). In the asset assessment for Dolores Barg, $104,875 was excluded. This amount corresponds to the value of the home, one jointly-owned vehicle, and a burial lot. When completing the asset assessment, a portion of the couple's resources is reserved for the needs of the spouse not applying for Medicaid. 42 U.S.C. § 1396r-5(c)(2), (f)(2)(A) (2000). Protected assets for the nonrecipient spouse, Francis Barg, were calculated to be $24,607.

couple held jointly at Bremer Bank. There is no allegation that these actions were improper or fraudulent.

On January 1, 2004, Dolores Barg died, having received $108,413.53 in Medicaid benefits. At the time of her death, assets belonging to either Dolores or Francis Barg included three certificates of deposit, a checking account, and an IRA account, all in the name of Francis Barg alone; one certificate of deposit payable to the funeral home for Dolores Barg's funeral; two vehicles, together worth approximately $9,000; the homestead titled in Francis Barg's name, valued at $120,800; and miscellaneous household goods and furniture. All of these assets had been jointly held at some time during the couple's 55-year marriage.

On May 27, 2004, Francis Barg died, never having received Medicaid benefits. On July 30, 2004, the County filed a claim against Francis Barg's estate, seeking to recover $108,413.53, the full amount Dolores Barg had received in Medicaid benefits.

Michael Barg disallowed $44,533.53 of the claim, and allowed $63,880. The County petitioned for an allowance of the full claim, arguing that the entire value of the marital property, both the homestead and the certificates of deposit, was subject to its claim because Dolores Barg's joint tenancy interest gave her a right to use of the entire property. The district court concluded that Dolores Barg's interest in the

property at the time of her death was equivalent to a life estate, and upheld the partial disallowance.

The County appealed. The court of appeals explained that, based on *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn.App.2002), the County's ability to recover against Francis Barg's estate was limited to Dolores's interest in marital or jointly owned property at the time of her death. *Barg*, 722 N.W.2d at 496. The court decided that property law principles should be applied to determine the nature of that interest and that under federal law and *Gullberg*, Dolores Barg retained a joint tenancy interest in the homestead at the time of her death. *Id.* at 497. The court valued that interest as an undivided one-half of the property's value, and remanded the case to the district court for a recalculation of the amount of the claim that was allowable. *Id.*

The County petitioned for review. The Estate opposed review but sought conditional cross-review on the issue of whether federal law permits the State to recover at all from a surviving spouse's estate. We granted review, as well as cross-review, and asked for briefing on whether the Estate had adequately preserved for review the issue of "whether the county may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of a surviving spouse." We granted requests by the Minnesota Commissioner of Human Services to file an amicus curiae brief aligned with the County and to

participate in oral argument.[3] We also granted requests by the Elder Law Section of the Minnesota State Bar Association and the National Senior Citizens Law Center to file an amicus curiae brief aligned with the Estate. After oral argument, we asked the parties for supplementary briefing on the relationship of the 2003 and 2005 amendments of Minn.Stat. § 256B.15, subds. 1 and 1c-1k (2006), to the authority the County argues exists under Minn.Stat. § 256B.15, subd. 1a (2006) and Minn.Stat. § 256B.15, subd. 2 (2006), and how that relationship affects preemption analysis and the scope of recovery permissible under Minnesota law.

Statutory Framework.

Congress enacted Medicaid in 1965 as Title XIX of the Social Security Act to ensure medical care to individuals who do not have the resources to cover essential medical services. *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d 1, 9 (Minn.2002). Medicaid was intended to be the payor of last resort. *Id.* The program is jointly funded with the states as a "cooperative endeavor in which the Federal Government

---

[3] The Commissioner's motion to supplement the record on review is granted as to the following documents: North Dakota Medicaid State Plan, Transmittal No. 95-016; Indiana Medicaid State Plan, Transmittal No. 05-012; Idaho Medicaid State Plan, Transmittal No. 01-006; and Minnesota Medicaid State Plan, Transmittal No. 06-10. The motion is denied as to the e-mail correspondence dated November 4, 1999.

provides financial assistance to participating States to aid them in furnishing health care to needy persons." *Harris v. McRae,* 448 U.S. 297, 308, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Participating states enact legislation and rules, incorporate them into state medical assistance plans, and submit those plans to the U.S. Secretary of Health and Human Services for approval. 42 U.S.C. § 1396a(a)-(b) (2000 & Supp. III 2003). After this, the states can receive federal payments. 42 U.S.C. § 1396 (2000). Each state administers its own program within the federal requirements, and the Centers for Medicare and Medicaid Services (CMS)[4] administer the program and approve state plans. *Martin,* 642 N.W.2d at 9. One of the requirements imposed on state plans is that they must "comply with the provisions of [42 U.S.C. § 1396p] with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." 42 U.S.C. § 1396a(a)(18) (2000).

To receive Medicaid, a person must qualify as either "categorically" or "medically" needy. *Estate of Atkinson v. Minn. Dep't of Human Servs.,* 564 N.W.2d 209, 210-11 (Minn.1997). A person is "categorically needy" if he is eligible for other specified federal assistance programs. *Id.* at 211. A person is "medically needy" if he incurs medical expenses that reduce

---

[4] Formerly the Health Care Financing Administration (HCFA). *See Wis. Dep't of Health & Family Servs. v. Blumer,* 534 U.S. 473, 479 n. 1, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002).

his income to roughly the level of those who are categorically needy. *Id.* To qualify as medically needy a person may have income no higher than a defined threshold and may own assets of no more than a defined value. *Id.* If the assets of a Medicaid applicant and her spouse exceed the qualifying threshold, they must "spend down" their assets until they are at or below the qualifying threshold. *Id.* If a potential Medicaid recipient transfers assets below fair market value within a certain period of time before eligibility, the recipient is deemed ineligible for benefits for a time period mandated by statute. 42 U.S.C. § 1396p(c) (2000). This provision prevents people who are not needy from becoming eligible for Medicaid by transferring their assets away.

When determining the eligibility of a married person to receive Medicaid, states consider assets of both husband and wife as available to the spouse requesting benefits. 42 U.S.C. § 1396r-5(c) (2000). But there are several provisions in place to protect the community spouse[5] from being impoverished as a result of the spend-down of assets needed to qualify the applicant for Medicaid. *See Atkinson,* 564 N.W.2d at 211; 42 U.S.C. § 1396r-5 (2000). The value of the

---

[5] Throughout this opinion, our discussion of spouses is premised on circumstances similar to those of the Bargs. One spouse, who we refer to as the recipient spouse, applies for and receives Medicaid benefits. The other, who we refer to as the community or surviving spouse, receives no Medicaid benefits and survives the recipient spouse.

couple's home is not included among assets considered eligible to pay for medical care. *Id.* § 1396r-5(c)(5); 42 U.S.C. § 1382b(a)(1) (2000). The community spouse of a Medicaid recipient is also entitled to an allowance of income and assets designated for his or her needs that is not considered available to pay for the recipient spouse's medical care. 42 U.S.C. § 1396r-5(d). Furthermore, the recipient spouse has the right to transfer assets, including an interest in the homestead, to his or her community spouse. 42 U.S.C. § 1396p(c)(2). Medicaid thus balances the obligation of community spouses to contribute to the payment of medical expenses for their recipient spouses against the accommodation of the community spouse's need to provide for his or her own support.

Federal Medicaid Recovery Provisions.

Although it is not applicable to the facts before us, it is useful to start with the pre-1993 federal law on Medicaid recovery, because it is relied on in the parties' arguments and is the basis for the rationale of several relevant cases. Prior to amendments adopted in the Omnibus Budget Reconciliation Act (OBRA) of 1993, the federal Medicaid statute stated a general principle that there should be no recovery of correctly paid Medicaid benefits, subject to several exceptions, one of which is relevant here:

> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except –

* * * *

> (B) in the case of any other individual who was 65 years of age or older when he received such assistance, from his estate.

42 U.S.C. § 1396p(b)(1) (1988). Under this pre-1993 law, states were allowed, but not required, to recover Medicaid benefits paid to recipients 65 or older, and the statute specified the recovery would be from the recipient's estate. The statute also provided that this recovery from the recipient's estate could only be made after the death of the recipient's surviving spouse. *Id.* § 1396p(b)(2) (1988). Despite this prohibition against recovery before the death of a surviving spouse, there was no express mention of recovery from the estate of a surviving spouse. The pre-1993 federal law contained no definition of "estate."

Section 1396p(b) was amended as part of the OBRA amendments of 1993. Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 13612(a), (c), 107 Stat. 312, 627-28 (codified as amended at 42 U.S.C. § 1396p(b)(1), (4) (2000)). As amended, the federal law retained the general prohibition against states attempting to recover Medicaid payments correctly paid on behalf of an individual, with limited exceptions. 42 U.S.C. § 1396p(b) (2000). But the 1993 amendments changed section 1396p(b) in several ways. First, they lowered the age criterion for recovery from 65 to 55. Second, they made recovery allowed by the exceptions mandatory rather than permissive. Third, they added a definition of "estate,"

which itself had both mandatory and permissive elements. As amended, the general nonrecovery rule and the relevant exception read as follows:

> (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> * * *
>
> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate * * * .

Id. The amended version of section 1396p(b)(1)(B) retained the express reference to recovery from the recipient's estate. Furthermore, as was true pre-amendment, this recovery from the recipient's estate is only permitted after the death of the recipient's surviving spouse: "Any adjustment or recovery under paragraph (1) may be made only *after* the death of the individual's surviving spouse, if any * * * ." 42 U.S.C. § 1396p(b)(2) (emphasis added). And like the pre-1993 version, the amended federal statute contains no express authorization for, or reference to, recovery from a surviving spouse's estate.

The 1993 amendments added a definition of "estate" for purposes of Medicaid recovery, with a mandatory provision that looks to state probate law and an optional provision that authorizes states to expand the definition beyond the scope of probate law:

> [T]he term "estate", with respect to a deceased individual –
>
> > (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
> >
> > (B) may include, at the option of the State * * * any other real and personal property and other assets in which the individual had any legal title or interest *at the time of death* (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4) (emphasis added). Under this provision, a state has the option to adopt a definition of "estate" for Medicaid recovery purposes that includes some assets which, under ordinary probate law, would not be part of the Medicaid recipient's estate, because they would pass immediately to someone else on the recipient's death. For example, when two persons hold property in joint tenancy with a right of survivorship and one dies, the deceased

joint tenant's interest ordinarily passes directly to the surviving joint tenant and is not part of the probate estate. Under the optional expanded definition allowed by federal law, for Medicaid recovery purposes the interest of a deceased joint tenant who had received Medicaid would be included in his estate, rather than passing directly to the surviving joint tenant.

Minnesota's Medicaid Recovery Laws.

Minnesota has long had a policy of requiring participants in the Medicaid program and their spouses to use their own assets to pay their share of the cost of care during or after enrollment. Minn.Stat. § 256B.15, subd. 1(a) (2006). To implement this policy, since 1987 Minnesota law has provided for recovery of Medicaid benefits paid from the estate of a recipient or the estate of the recipient's surviving spouse. Minn.Stat. § 256B.15, subd. 1a (originally enacted as Act of June 12, 1987, ch. 403, art. 2, § 82, 1987 Minn. Laws 3255, 3347). As relevant here, subdivision 1a provides that, "on the death of the survivor of a married couple, either or both of whom received medical assistance, * * * the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the [recipient] *or the estate of the surviving spouse.*" *Id.* (emphasis added). A claim against the estate of a surviving spouse for medical assistance provided to the recipient spouse may be made up to "the value of the assets of the estate that were marital property or

jointly owned property *at any time during the marriage.*" *Id.*, subd. 2 (emphasis added).

The broad estate recovery authority contained in subdivisions 1a and 2 was supplemented in 2003 by amendments to the statute expanding subdivision 1 and adding subdivisions 1c-1k. Act of June 5, 2003, ch. 14, art. 12, §§ 40-50, 2003 Minn. Laws 1st Spec. Sess. 1751, 2205-17. These amendments implement the optional expanded definition of "estate" authorized in the 1993 amendments to the federal law. *See* Minn.Stat. § 256B.15, subd. 1(a)(2) (2006); 42 U.S.C. § 1396p(b)(4)(B). The 2003 amendments to the Minnesota estate recovery law modify common law to provide for continuation of a recipient's life estate or joint tenancy interest in real property after his death for the purpose of recovering medical assistance, Minn.Stat. § 256B.15, subd. 1(a)(3) (2006), and include that continued interest in the recipient's estate. Minn.Stat. § 256B.15, subds. 1g, 1h(b), 1i(a), 1j. The 2003 amendments also establish specific procedures for exercising claims against these continued life estate and joint tenancy interests, as well as procedures and waiting periods that differ according to whether the recipient's spouse, dependent children, or other relatives living in the homestead survive the recipient. Act of June 5, 2003, ch. 14, art. 12, §§ 48-49, 2003 Minn. Laws 1st Spec. Sess. 1751, 2213-17 (codified as amended at Minn.Stat. § 256B.15, subds. 1i and 1j). In this case, the County filed its claim under subdivisions 1a and 2 and did not rely on provisions added in the 2003 amendments.

The issues presented in this case involve several questions about the relationship between the recovery provisions of federal and Minnesota Medicaid law. The court of appeals held that a partial disallowance of the County's claim was proper, relying on its earlier decision in *Gullberg* that the broad authorization in subdivision 2 for recovery up to the value of all assets of the estate that were marital property or jointly owned *at any time during the marriage* was partially preempted by the 1993 amendments to the federal law that limit the expanded estate to assets in which the recipient spouse had a legal interest *at the time of her death. Barg,*722 N.W.2d at 595-96 (citing *Gullberg,* 652 N.W.2d at 714).

The County, and its supporting amicus curiae the Commissioner of the Department of Human Services, argue that the court of appeals was wrong, both here and in *Gullberg,* in finding any preemption of the broad estate recovery authorized in subdivisions 1a and 2. They contend that there was nothing in the federal statute prior to the 1993 amendments that limited the states' authority to pursue estate recovery of Medicaid benefits paid, and that the 1993 amendments were intended by Congress to expand state options, not limit them. Alternatively, the County argues that even if recovery is limited to the assets in which the recipient had an interest at the time of her death, Dolores Barg had an interest in the property notwithstanding the conveyance to her husband, and the court of appeals erred in valuing that interest as only one-half the value of the homestead.

The Estate and its supporting amici curiae counter that federal law authorizes recovery only from a recipient's estate, and Minnesota law that allows recovery from a surviving spouse's estate is therefore preempted.[6] The Estate argues that recovery is also barred because, to the extent recovery is allowed from the estate of a surviving spouse, federal law limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death, and subdivision 2 of section 256B.15 is preempted to the extent it allows broader recovery. Finally, the Estate argues that there should be no recovery here because Dolores Barg had no legal

---

[6] The Estate sought cross-review on this issue of "whether the county may recover Medicaid benefits correctly paid on behalf of a predeceased spouse from the estate of a surviving spouse." We requested briefing on whether that issue had been adequately preserved for review. The County argues that the Estate failed to preserve the issue because it only partially disallowed the County's claim, it confirmed before the district court that only the disallowed portion of the claim was contested, and it asked the court of appeals to affirm the district court's decision. The County's arguments go to the scope of the remedy available in this case, an issue that we address infra. But this issue also has a legal aspect independent of the specific scope of recovery available in this case. That legal component is necessary to a thorough analysis of the preemption issues presented here, and we will therefore address the issue in that context. No new or controverted facts are needed in order to address this purely legal question, and no prejudice will result from our consideration of the issue because the parties addressed the issue in their briefs to the district court, the court of appeals, and this court. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687-88 (Minn.1997).

interest in the homestead or the certificates of deposit at the time of her death, having conveyed her interest to her husband during her lifetime.

Thus, the issues presented are as follows. First, does federal law preempt the authorization in Minn.Stat. § 256B.15, subd. 1a, for recovery of Medicaid benefits paid for a recipient spouse from the estate of the surviving spouse? Second, if such recovery from a surviving spouse's estate is not preempted, does federal law limit the recovery to assets in which the recipient had an interest at the time of her death, preempting the broader recovery allowed in Minn.Stat. § 256B.15, subd. 2, as to assets owned as marital property or in joint tenancy at any time during the marriage? Third, if recovery is limited to assets in which the recipient had an interest at the time of her death what, if any, interest did Dolores Barg have in the homestead or the certificates of deposit at the time of her death, and specifically, was the court of appeals correct in holding that Dolores Barg had a joint tenancy interest for purposes of estate recovery even though she transferred that interest to her husband during her lifetime? We address these issues in turn, after first reviewing basic preemption principles.

I.

Whether federal law preempts state law is primarily an issue of statutory interpretation, which we

review de novo. *Martin,* 642 N.W.2d at 9. The application of law to stipulated facts is a question of law, which we also review de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue,* 488 N.W.2d 254, 257 (Minn.1992).

Congressional purpose is "'the ultimate touchstone'" of the preemption inquiry. *Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)). Our primary focus in the analysis must be to ascertain the intent of Congress. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987). The United States Supreme Court has explained that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Thus, preemption is generally disfavored. *Martin,* 642 N.W.2d at 11 (citing *Cipollone,* 505 U.S. at 516, 518, 112 S.Ct. 2608).

Congress may preempt state law in several ways. *Cal. Fed. Sav. & Loan Ass'n,* 479 U.S. at 280, 107 S.Ct. 683. First, it may do so with express language preempting state law. *Id.* Second, it may do so by fully occupying the field, that is, "congressional intent

to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Id.* at 280-81, 107 S.Ct. 683 (quoting *Rice,* 331 U.S. at 230, 67 S.Ct. 1146). Here, it is clear that Congress neither expressly preempted state law nor so completely occupied the field as to leave no room for state action, because the Medicaid program specifically permits and even requires action by participating states. *Martin,* 642 N.W.2d at 11.

The third kind of preemption is at issue in this case. Even when Congress has not chosen to displace state law expressly or by fully occupying the field, "federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law." *Cal. Fed. Sav. & Loan Ass'n,* 479 U.S. at 281, 107 S.Ct. 683. Conflict preemption occurs when compliance with both state and federal laws is impossible, *Fla. Lime Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

II.

We now turn to the question of whether Minn.Stat. § 256B.15, subd. 1a, which requires Medicaid recovery against the estate of a surviving spouse,

is preempted by federal law, particularly 42 U.S.C. § 1396p(b)(1)(B). Because only conflict preemption may be applicable, we seek to determine whether compliance with both statutes is impossible or whether the state law stands as an obstacle to accomplishment of the purposes of the federal law.

The County seeks recovery here under subdivision 1a of section 256B.15, which authorizes – indeed requires – recovery of Medicaid benefits from the estate of the surviving spouse of a recipient. The Estate argues that this state law authorization to recover from the estate of the surviving spouse is preempted because it conflicts with 42 U.S.C. § 1396p(b)(1), which prohibits recovery of correctly paid Medicaid benefits except from the estate of the recipient of the benefits.

The federal statute establishes a general prohibition against recovery of correctly paid Medicaid benefits, subject to three specified exceptions:

> (1) *No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except* that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan *in the case of the following individuals:*

42 U.S.C. § 1396p(b)(1) (emphasis added). Only one exception potentially applies to the circumstance of this case:

> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery *from the individual's estate* * * * .

Id. § 1396p(b)(1)(B) (emphasis added). Because this express exception to the general rule against recovery of Medicaid benefits directs that recovery come from the recipient's estate and makes no reference to a surviving spouse's estate, the Estate argues that recovery from the surviving spouse's estate is not allowed under federal law. Because exceptions to a general statement of policy are to be construed narrowly, *Comm'r v. Clark,* 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989), it appears on its face that recovery from the surviving spouse's estate is not permitted by federal law.

Two courts have agreed with this analysis and concluded that section 1396p(b)(1)(B) authorizes recovery only from the recipient's estate and does not allow recovery from the estate of a surviving spouse. *Hines v. Dep't of Pub. Aid,* 221 Ill.2d 222, 302 Ill.Dec. 711, 850 N.E.2d 148, 152-53 (2006); *In re Estate of Budney,* 197 Wis.2d 948, 541 N.W.2d 245, 246 (1995), *rev. denied* 546 N.W.2d 471 (Wis.1996). The Wisconsin Court of Appeals explained that the federal statute never "counter[ed] the initial blanket prohibition" on recovery by authorizing recovery from the surviving spouse's estate. *Budney,* 541 N.W.2d at 246. The Illinois Supreme Court noted that under federal and Illinois law, the state had authority to seek reimbursement

from the recipient's estate after the death of his surviving spouse. *Hines,* 302 Ill.Dec. 711, 850 N.E.2d at 153. But instead, as here, the state sought recovery from the estate of the surviving spouse. *Id.* The court explained that federal law allows only three exceptions under which a state may seek reimbursement and "[a]ll are specifically directed to the estate of the recipient. No provision is made for collection from the estate of the recipient's spouse." *Id.* The court declined to add to the unambiguous language of the federal statute or to recognize exceptions beyond those specified in the federal law. *Id.*

The Commissioner argues that *Hines* and *Budney* were wrongly decided, misinterpreting the federal statute, particularly in light of the presumption against preemption. The County contends that this statutory exception to the nonrecovery principle allows recovery generally against individuals who received benefits after age 55, and does not narrowly limit the sources of recovery. The County asserts that the reference to the individual's estate is merely a designation of the timing for recovery rather than a limit on the scope of recovery, because the language does not say that the state may recover "only" from the individual's estate. The County argues that, absent such express limiting language, and applying the presumption against preemption, section 1396p(b)(1)(B) merely specifies one potential source of recovery, the recipient's estate, and does not preclude others, such as a spouse's estate.

In our view, the plain language of section 1396p(b)(1)(B) comports far more closely with the interpretation of the Illinois Supreme Court in *Hines* than with the County's expansive view of the authority imparted by that provision. Moreover, we know of no court that has adopted the County's broad view of that language alone. Indeed, in explaining the then-existing law in a report on proposed OBRA amendments in 1993, a House Report referred only to the possibility of recovery from the estate of the recipient, even when describing recovery after the death of a surviving spouse:

> Under current law, a State has the option of seeking recovery of amounts correctly paid on behalf of an individual under its Medicaid program *from the individual's estate* if the individual was 65 years or older at the time he or she received Medicaid benefits. The State may not seek recovery *from the beneficiary's estate* until the death of the surviving spouse, if any, and only if the individual has no surviving minor or disabled child.

H.R.Rep. No. 103-111, at 208 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 378, 535 (emphasis added). In contrast, describing the proposed 1993 amendments to the Medicaid recovery law passed by the House, the same House Report stated that newly-required state estate recovery programs would have to "provide for the collection of the amounts correctly paid by Medicaid on behalf of the individual for long-term care services from the estate of the individual *or the surviving spouse.*" *Id.* Thus, when the House wanted

to describe recovery from the surviving spouse's estate, it said so clearly.

Nevertheless, despite the seemingly plain language providing only for recovery from the recipient's estate, we acknowledge that several courts have interpreted the federal recovery provisions to allow recovery from the estate of a surviving spouse. The courts reaching this conclusion have for the most part relied on the 1993 amendments to the federal law that allow the states to adopt an expanded definition of estate for purposes of Medicaid recovery. For example, the New York Court of Appeals explained, in dicta, that although federal law did not expressly provide for recovery of Medicaid payments from the "secondarily dying spouse's estate," the 1993 amendments gave the states power to recover against the spouse's estate for certain categories of assets. *In re Estate of Craig,* 82 N.Y.2d 388, 604 N.Y.S.2d 908, 624 N.E.2d 1003, 1006 (1993). The North Dakota Supreme Court agreed with the *Craig* interpretation that the 1993 expanded estate provision gave the states the option to recover against a surviving spouse's estate assets conveyed through joint tenancy or right of survivorship. *In re Estate of Thompson,* 586 N.W.2d 847, 850 (N.D.1998). Indeed, the court in *Thompson* rejected the ruling in *Budney* that recovery against a surviving spouse's estate is not allowed under federal law on the basis that the *Budney* court had not considered the optional expanded definition of "estate." *Thompson,* 586 N.W.2d at 850. The North Dakota court concluded that "consideration of all the

relevant statutory provisions, in light of the Congressional purpose to provide medical care for the needy, reveals a legislative intention to allow states to trace the assets of recipients of medical assistance and recover the benefits paid when the recipient's surviving spouse dies." *Id.* at 851. The court explained that, under the circumstances, it made no difference whether recovery was from one estate or the other:

> Because the expansive federal definition of "estate" in 42 U.S.C. § 1396p(b)(4) extends only to assets in which the medical assistance benefits recipient "had any legal title or interest in at the time of death," *it is a matter of little moment whether the department seeks to recover the benefits paid by filing a claim in the estate of the recipient after the death of the recipient's surviving spouse or by filing a claim in the surviving spouse's estate.*

Id. n. 3 (emphasis added). Finally, in *Idaho Department of Health and Welfare v. Jackman,* 132 Idaho 213, 970 P.2d 6, 9-10 (1998), the Supreme Court of Idaho also ruled that some recovery of Medicaid benefits could be made from the estate of a surviving spouse, but held that such recovery was preempted by federal law except to the extent of assets that had been in the recipient's estate as defined by state probate law.

These courts provide little explanation for their conclusions that the statutory language expressly mentioning recovery only from the recipient's estate

also allows recovery from the surviving spouse's estate. We infer that the courts viewed the authority to recover from assets that were part of the recipient's estate after the death of the surviving spouse to fairly imply authority to recover those assets from the surviving spouse's estate to which they had passed on the death of the recipient. In other words, to the extent assets in the surviving spouse's estate are there because they had passed to the surviving spouse from the estate of the recipient, recovery from those assets in the surviving spouse's estate is, in essence, recovery from the recipient's estate.

The Ninth Circuit Court of Appeals appears to have made a similar unspoken inference in assessing preemption of California Medicaid recovery laws in two cases. *Bucholtz v. Belshe,* 114 F.3d 923 (9th Cir.1997); *Citizens Action League v. Kizer,* 887 F.2d 1003 (9th Cir.1989), *cert. denied,* 494 U.S. 1056, 110 S.Ct. 1524, 108 L.Ed.2d 764 (1990). In both cases, the Ninth Circuit addressed whether California's Medicaid recovery law was preempted by pre-1993 amendment federal law. The California law allowed the state to seek recovery not only from the estate of the deceased Medicaid recipient, but "'against any recipient of the property of that decedent by distribution or survival.'" *Kizer,* 887 F.2d at 1005 (quoting Cal. Welf. & Inst.Code § 14009.5 (West Supp.1989)). Thus, California law allowed the state to trace assets of the deceased Medicaid recipient and seek reimbursement from the recipients of those assets.

In *Kizer* the plaintiffs were individuals who had owned property in joint tenancy with a Medicaid recipient and had succeeded to ownership by right of survivorship upon the death of the Medicaid recipient. *Id.* at 1005. To determine whether California's claimed right of recovery from these surviving joint tenants was inconsistent with federal law, the court looked to section 1396p(b)(1)(B), which, as discussed above, provided the general prohibition against recovery with the exception for individuals who were 65 years old when they received assistance. *Id.* at 1006. The Ninth Circuit noted that the federal statute provided only for recovery from the individual's "estate," and in the absence of a federal statutory definition of estate, looked to common law for the meaning of the term. *Id.* at 1006. The court held that an "estate" under common law did not include property held in joint tenancy at death, and therefore the California law that allowed recovery against such property went beyond the recipient's estate and was too broad. *Id.* at 1008. The court in *Kizer* did not expressly address the issue of whether assets within the definition of "estate" could only be reached by a claim against the recipient's estate, or whether federal law would permit the state to follow those assets and make the claim against a surviving joint tenant – or, as here, a surviving spouse.

Several years later, still applying pre-1993 federal law, the Ninth Circuit again addressed a preemption challenge to the same broad California Medicaid recovery provision. *Bucholtz,* 114 F.3d at

924. At issue in *Bucholtz* was application of the state recovery law to assets of Medicaid recipients that had been subject to three forms of joint interests: inter vivos trusts, tenancy in common, and community property. *Id.* at 924. The court applied the *Kizer* principle that "'use of the word "estate" in the [federal] recoupment provision limits a state's recovery to property which descends to the recipient's heir or the beneficiaries of the recipient's will upon death,'" *id.* at 925 (quoting *Kizer*, 887 F.2d at 1005), to each of the forms of shared interest at issue. The court concluded that, like the joint tenancy in *Kizer*, property held in an inter vivos trust is not part of the decedent's estate under California common law, and therefore was not part of the estate subject to recovery under the federal law. *Id.* at 926. In contrast, the court explained, a decedent's interest in property held in tenancy in common or community property is subject to disposition and administration as part of the decedent's estate under California law. *Id.* at 926-27. The Ninth Circuit concluded not only that the decedent's interest in property held in those forms was subject to recovery under the federal law, but also held, albeit without explanation, that recovery could be sought from the heirs or beneficiaries who received that property: "[California] may, however, pursue *people who received property* held by the decedent in the form of tenancy in common or community property." *Id.* at 928 (emphasis added). Like other courts, the Ninth Circuit seems to have inferred that the federal law's reference to recovery from the Medicaid recipient's "estate" conferred authority to follow the assets from

that estate and recover them from the people who received the property.

Thus, the courts that have considered the issue are split on the question of whether the narrow reference in section 1396p(b)(1) to recovery from the estate of the Medicaid recipient allows recovery only through a direct claim against that estate, or whether recovery is also allowed from those who received covered assets from the Medicaid recipient's estate, including the estate of a surviving spouse. Were this an ordinary question of statutory interpretation, we would conclude that the plain language of the federal statute provides only for recovery against the Medicaid recipient's estate, as the Illinois court persuasively reasoned in *Hines*. But we are influenced by the principle that preemption of state laws is disfavored, combined with the fact that allowing recovery against a surviving spouse's estate is consistent with both the federal provision precluding recovery from the Medicaid recipient's estate until after the death of a surviving spouse as well as with the purposes of the federal legislation.[7] These additional considerations

---

[7] The United States Supreme Court has described Congress's passage of the anti-impoverishment provisions as an effort to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 480, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002). Allowing recovery from a spouse's estate does not risk impoverishing a community spouse, because the spouse must be dead for the recovery to occur. Nor does it impede the furnishing of Medicaid

(Continued on following page)

lead us to conclude that the split in authority, in these particular circumstances, illustrates sufficient ambiguity about the intent of the federal estate recovery language that we cannot say that Minnesota's requirement in Minn.Stat. § 256B.15, subd. 1a, to seek reimbursement from the estate of a surviving spouse conflicts with federal law such that it is preempted.

Accordingly, we hold that federal law does not preclude all recovery from the estate of a surviving spouse, and the authorization in subdivision 1a to make a claim against the estate of a surviving spouse is therefore not preempted. The question remains whether federal law limits the scope of recovery against the estate of a surviving spouse and, in particular, whether that recovery may reach all property previously held by the Medicaid recipient spouse either as marital property or jointly with the surviving spouse during the marriage, as allowed by Minn.Stat. § 256B.15, subd. 2.

III.

We turn to a determination of whether the scope of recovery from a surviving spouse's estate allowed

---

benefits to other impoverished individuals; indeed, it can be expected to do quite the opposite. *See West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 285 (4th Cir.2002) (noting that Congress expected the estate recovery provisions to allow government to realize savings of $300 million over five years, and that the savings have been even greater).

under Minnesota law is consistent with federal law. Subdivision 2 of Minn.Stat. § 256B.15 allows the state to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage.*" (Emphasis added.) The County argues that this broad estate recovery authority does not conflict with federal law because the pre-1993 version of section 1396p(b) should be construed broadly and the 1993 amendments were intended to expand, not restrict, state estate recovery authority. In asserting this argument for broad estate recovery authority, the County emphasizes that it is consistent with the dual goals of federal law of recouping Medicaid expenses to make assistance available to more qualifying recipients, while protecting community spouses from pauperization during their lifetimes. The Estate argues that, because section 1396p(b)(1) allows recovery only from a recipient's estate and section 1396p(b)(4) allows expansion of the estate only to include assets in which the recipient had an interest at the time of death, the "any time during the marriage" recovery allowed by subdivision 2 is preempted.

The County's argument would take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language. Significantly, no court has embraced the County's argument that the pre-1993 federal law authorized recovery from a surviving spouse's estate of assets that were jointly owned during the marriage but

transferred by the recipient spouse prior to her death. Indeed, of the courts that have interpreted federal law to allow direct claims against the estate of a surviving spouse, only one has construed that authority to extend to assets that were transferred before the death of the Medicaid recipient, and that court relied on language from the 1993 amendments to support that extension. *See In re Estate of Wirtz,* 607 N.W.2d 882, 885-86 (N.D.2000).

Other courts that have recognized authority to recover from a source other than the Medicaid recipient's estate have construed that authority to reach only assets in which the Medicaid recipient had an interest at the time of her death, that is, assets which were part of the recipient's estate as defined by traditional state probate law or included in the estate under an expanded definition allowed by the 1993 amendments to federal law. *See Bucholtz,* 114 F.3d at 925-27 (limiting recovery to assets that were part of recipient's estate as defined by state probate law); *Kizer,* 887 F.2d at 1006 (same); *Jackman,* 970 P.2d at 8-10 (holding that recovery from surviving spouse's estate allowed by Idaho Medicaid recovery statute is limited by federal law to assets that were part of the Medicaid recipient's estate as defined under state probate law); *Thompson,* 586 N.W.2d at 851 n. 3 (recognizing that "expansive definition of 'estate' in [section] 1396p(b)(4) extends only to assets in which the medical assistance benefits recipient 'had any legal title or interest in at the time of death'"); *see also In re Estate of Smith,* No. M2005-01410-COA-R3-CV, 2006 WL 3114250 at *4 (Tenn.Ct.App. Nov.1, 2006) (explaining

that courts that have allowed recovery against estates of surviving spouses have required that [the] recipient [spouse] ha[ve an] interest in [the] assets at time of death).

Similarly, in relying on the 1993 amendments as authority for recovery from a surviving spouse's estate, our court of appeals acknowledged that the 1993 amendments limit the assets subject to recovery to those in which the Medicaid recipient had a legal interest at the time of her death. *See Gullberg,* 652 N.W.2d at 714 (holding that Minn.Stat. § 256B.15, subd. 2, authorization to reach assets that were marital property or owned jointly at any time during the marriage, is partially preempted by federal law limitation to assets in which recipient had interest at time of death). And the court of appeals acknowledged that limitation again in this case. *Barg,* 722 N.W.2d at 496 ("After *Gullberg,* the state's ability to recover was limited to the recipient's interest in marital or jointly owned property at the time of the recipient's death.").

As noted above, the only decision to deviate from this limiting principle requiring an interest at the time of death is *Wirtz.* Although the North Dakota court had acknowledged in its earlier *Thompson* decision that recovery allowed under section 1396p(b) is limited to assets in which the Medicaid recipient had an interest at the time of death (indeed that was the basis on which the court rationalized allowing recovery from the surviving spouse's estate), 586 N.W.2d at 851 n. 3, the court held in *Wirtz* that any

assets conveyed by the Medicaid recipient to his spouse before his death were subject to recovery from the surviving spouse's estate, 607 N.W.2d at 886. The court stated that limiting recovery under section 1396p(b) to "assets in the surviving spouse's estate that the Medicaid recipient had legal title to and conveyed through joint tenancy, tenancy-in-common, survivorship, life estate, or living trust" would ignore the words "interest" and "other arrangement" in the federal law. *Wirtz,* 607 N.W.2d at 885. Concluding that the words "interest" and "other arrangement" are ambiguous, the court relied on the Congressional intent it perceived "to allow states a wide latitude in seeking Medicaid benefit recoveries." *Id.* at 885-86. The court did not explain why the same purpose acknowledged in *Thompson* was consistent with the limitation to recovery from assets in which the recipient had an interest at the time of death, yet also justified abandoning that limitation in *Wirtz.*

We cannot agree that the "other arrangement" language in the 1993 amendment is ambiguous in the sense implied in *Wirtz.* The plain meaning of "other arrangement," read in the context of section 1396p(b)(4), is arrangements other than those expressly listed that also convey assets at the time of the Medicaid recipient's death.

We return again to the language of the federal statute. The federal optional definition of "estate" allows inclusion of

> any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including *such assets* conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. § 1396p(b)(4)(B) (emphasis added). The "including" clause further describes the assets that a state may include in this expanded estate. The clause describes those assets in two ways – first by the limiting adjective "such," and second by the language describing how and to whom "such assets" are "conveyed." The "such" limitation plainly refers back to the immediately preceding clause describing the assets as those "in which the individual had any legal title or interest at the time of death." The including clause then describes to whom "such" assets may have been conveyed – a "survivor, heir, or assign *of the deceased individual.*" *Id.* (emphasis added). And finally, the clause describes several methods by which the conveyance of "such" assets might take place – "through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." *Id.*

Inclusion in the list of examples of "such assets" is predicated on the recipient having a legal interest at the time of death. When we construe a federal statute we must, if at all possible, give effect "to every word Congress used." *Reiter v. Sonotone Corp.*, 442

U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). To read "other arrangement" to include a lifetime transfer would be to read the words "at the time of death" out of the statute. The conclusion that "other arrangement" cannot include lifetime transfers is further supported by the additional context. "[O]ther arrangement" ends a list of examples of conveyances that occur at the time of death. The list of recipients of the conveyance, "a survivor, heir, or assign of the deceased individual," leaves no doubt that the "individual," a Medicaid recipient, must have died for the conveyance to occur. A recipient cannot have heirs or survivors during his or her lifetime. Nor can there be an "assign of the deceased" during the recipient's lifetime. In light of the plain statutory language and its context, the conclusion of the *Wirtz* court that "other arrangement" is sufficiently ambiguous to include lifetime transfers is unreasonable.

We conclude that there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death. As explained above, the rationale for finding authority to recover from a surviving spouse's estate at all emanates from the authority granted in the federal law to recover from the "estate" of the Medicaid recipient. Property transferred prior to death would not be part of the recipient's estate. Further, as recognized by every decision except *Wirtz,* to the extent the 1993 amendments allow states to expand the definition of "estate" for Medicaid recovery purposes, the language of the

federal law clearly limits that expansion to assets in which the recipient had an interest at the time of her death. Accordingly, we hold that Minn.Stat. § 256B.15, subd. 2, is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly-owned property *at any time* during the marriage. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient at the time of her death.

IV.

This brings us to the question of whether Dolores Barg had any interest in property at the time of her death that would allow the County to make a claim against the estate of her surviving spouse, despite her transfer of her joint interest in the property prior to her death. As we have noted, the court of appeals acknowledged the interest-at-time-of-death limitation on spousal estate recovery, but nevertheless found that for these purposes Dolores retained a joint tenancy interest at the time of her death that made the value of that interest recoverable from Francis's estate. *Barg,* 722 N.W.2d at 496, 497. Eschewing reference to either marital property law or probate law to determine the nature of any interest at the time of death, the court of appeals looked to standard real property law and *Gullberg* in deciding that Dolores retained a joint tenancy interest. *Id.* at 496-97. We do not agree.

The court of appeals determined that Dolores retained a joint tenancy interest in the property based on its understanding that the court in *Gullberg* had recognized a continuing joint tenancy interest because the lifetime transfer was an "other arrangement," and because the court apparently understood section 1396p(b)(4) to "explicitly allow[ ] a state to broaden the definition [of estate] beyond the meaning used in probate law and to include joint-tenancy interests *that have been previously conveyed to a spouse.*" *Id.* at 497. Section 1396p(b)(4) cannot be construed to include lifetime transfers of property in the phrase "other arrangement" because the plain language and the context require that phrase to be limited to conveyances occurring upon the death of the recipient. For that reason, we cannot agree with the court of appeals' characterization of section 1396p(b)(4) as allowing the expanded definition of estate to include "previously conveyed" joint tenancy interests. The language of section 1396p(b)(4) requires that any interest included in the expanded estate must be one in which the Medicaid recipient had an interest at the time of her death, not one that was previously conveyed. We conclude that Dolores did not retain a joint tenancy interest in the property at the time of her death, because that interest was effectively and legally transferred before her death.

The question remains whether Dolores had any other interest in the property at the time of her death that may be considered part of an expanded estate for recovery purposes under Minnesota law. We agree

with the court of appeals that courts should not look to marital property law to find such an interest, because the statute in which marital property is defined limits the definition to the purposes of that chapter. Minn.Stat. § 518.003, subds. 1, 3b (2006);[8] *see Barg*, 722 N.W.2d at 496. Similarly, we agree that the recognizable interests at the time of death cannot be limited to those defined by probate law, because the purpose of section 1396p(b)(4) is to allow states to expand the definition of estate beyond probate law. *See Barg*, 722 N.W.2d at 497. We therefore agree that real property law principles, informed by principles of probate law, should be the basis for ascertaining any interests at the time of death. Any interest recognized must be consistent with the underlying foundational rationale that recovery from a surviving spouse's estate is allowed only because of its relationship to the recipient's estate, from which federal law expressly allows recovery. With those principles in mind, we caution that for an interest to be traceable to and recoverable from a surviving spouse's estate, the interest must be (1) an interest recognized by law, (2) which the Medicaid recipient held at the time of death, and (3) that resulted in a conveyance of an interest of some value to the surviving spouse that occurred as a result of the recipient's death. Further, to the extent the interest is not part of the standard probate estate, Minnesota law must have expanded

---

[8] Formerly Minn.Stat. § 518.54, subds. 1, 5 (2004).

the definition of estate to include the interest, as authorized by section 1396p(b)(4).

Dolores's joint ownership in the homestead and certificates of deposit no longer existed at the time of her death. No other recognizable interest has been identified.

The County argues that the reference to marital property in subdivision 2 reflects the Minnesota legislature's intent to make all marital property subject to spousal estate recovery. But subdivision 2 makes no reference to an interest at the time of death or to re-defining the probate estate to include all marital property, even property transferred prior to death. This is not surprising because subdivision 2 was enacted long before the optional estate definition authority was added to federal law.

The district court indicated that because Dolores was married to Francis even after the transfer of her interest in the homestead, she retained some interest in the property. But whatever that interest, it dissipated at Dolores's death, rather than resulting in transfer of an interest of value to Francis.

We conclude that Dolores had no interest in assets at the time of her death that were part of a probate estate or an expanded estate definition permissible under federal law, and therefore there is no basis for the County's claim against the estate.

Finally, we note that in 2003 the Minnesota legislature amended section 256B.15 by extending the

definition of estate for Medicaid recovery purposes to include assets owned by a recipient spouse in joint tenancy or life estate at the time of her death. Act of June 5, 2003, ch. 14, art. 12, §§ 40-50, 2003 Minn. Laws 1st Spec. Sess. 1751, 2205-2217 (codified as amended at Minn.Stat. § 256B.15, subds. 1, 1c-1k). The amendments do not mention the other forms of conveyance at death listed in the federal definition of "estate," except that the "right of survivorship" is mentioned with respect to joint tenancies. *Id.* subds. 1(a)(6), 1g, 1h(b). Thus, the legislature chose only to include two forms of ownership in the expanded definition of estate. Also, as provided in the federal law, the inclusion of joint tenancy and life estate interests in the recipient's estate is expressly limited to interests the recipient owned at the time of death. Minn.Stat. § 256B.15, subds. 1h(b)(2), 1i(a). The amendments further limit the scope of recovery by exempting from the reach of subdivisions 1c through 1k a "homestead owned of record, on the date the recipient dies, by the recipient and the recipient's spouse as joint tenants with a right of survivorship." Minn.Stat. § 256B.15, subd. 1(a)(6). In 2005, the legislature retroactively made the provisions continuing life estates and joint tenancies effective only for life estate and joint tenancy interests created on or after August 1, 2003. Act of July 14, 2005, 1st Spec. Sess., ch. 4, art. 7, 2005 Minn. Laws 2454, 2649 (codified at Minn.Stat. § 256B.15, subd. 1(c)).

It is difficult to discern the intended reach of the 2003 amendments.[9] If the pre-2003 law allowed recovery against the surviving spouse's estate as argued by the County, there was little need to enact the 2003 amendments to reach those assets in the case of a recipient who leaves a surviving spouse. The parties apparently agree that the 2003 amendments do not apply to or influence this case, for reasons that are not clear to us.

It suffices to say that even if the 2003 amendments were applicable, they would provide no basis for the County's claim. The new subdivision 1i specifically applies to circumstances in which a Medicaid recipient against whom a recovery claim could otherwise be filed is survived by a spouse. Minn.Stat. § 256B.15, subd. 1i(b). That subdivision provides procedures for filing a claim without making a recovery until the death of the surviving spouse. *Id.*, subd. 1(f). If this subdivision were to be applied to this case, several limitations would preclude recovery. Dolores Barg, the recipient, owned no life estate or joint tenancy interest at the time of her death. If she had owned a joint tenancy at the time of her death, it would have been a homestead owned of record by her and her spouse as joint tenants with a right of survivorship, and thus exempted from the reach of subdivision 1i. *Id.*, subd. 1(a)(6). Finally, that joint tenancy

---

[9] The parties' supplemental briefs shed little light on this question.

was established in the 1960s, well before August 1, 2003.

In summary, we hold that federal law does not preempt all Medicaid recovery from spousal estates, and Minn.Stat. § 256B.15, subd. 1a, is therefore not preempted to the extent it allows claims against the estate of a surviving spouse of a Medicaid recipient. However, the allowable scope of spousal estate recovery is limited. Subdivision 2 of section 256B.15 is preempted to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have a legal interest at the time of death, and to the extent that it permits recovery beyond the extent of the recipient's interest. Finally, we hold that Dolores Barg had no interest in property at the time of her death that can form the basis for recovery against the estate of Francis Barg.

V.

We have concluded that the County's claim for full recovery against all the assets in Francis Barg's estate was preempted by federal law because recovery is limited to assets in which Dolores had an interest at the time of her death, but the question of the appropriate remedy remains, because the County argues that the Estate waived the right to deny the claim in its entirety. Although we have decided as a matter of law in our preemption analysis that the state is preempted from requiring reimbursement from assets in a spouse's estate in which the recipient

spouse had no interest at the time of her death, that does not resolve the remedy issue here. Although a state may not compel payment from a spouse's estate beyond the scope authorized by federal law, federal preemption does not preclude an estate from voluntarily paying all or part of a claim that could not be compelled.

Here, the Estate only partially disallowed the County's claim, thus allowing the remainder of the claim. Minnesota Statutes § 524.3-806(a) (2006) provides that, on petition of the personal representative after notice to the claimant, the court may "for cause shown permit the personal representative to disallow" a previously-allowed claim. But the personal representative made no such request here. When questioned at the hearing in district court whether the personal representative was challenging the entire claim of the County, the representative affirmed that he was challenging only the part already disallowed. When the district court affirmed that partial disallowance and the County appealed, the Estate did not file a notice of review in the court of appeals to challenge the implicit award to the County of the allowed part of its claim. A respondent who does not file a notice of review to challenge an adverse ruling of the district court waives that issue in the court of appeals. *See* Minn. R. Civ.App. P. 106; *Ford v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 294 N.W.2d 844, 845 (Minn.1980). Having partially allowed the County's claim and having then failed to properly seek a reversal of that allowance in both the

district court and court of appeals, the Estate will not be permitted to seek that relief for the first time in this court.

Accordingly, the decision of the court of appeals is affirmed in part and reversed in part. The court's denial of the County's claim for full recovery is affirmed. The court's remand for an award to the County based on the existence of a joint tenancy interest is reversed. The matter is remanded to the district court for entry of judgment based on the partial allowance made, but not subsequently challenged, by the Estate.

Affirmed in part and reversed in part.

ANDERSON, PAUL H., J., took no part in the consideration or decision of this case.

DIETZEN, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF MILLE LACS **SEVENTH JUDICIAL DISTRICT**

CIVIL LAW DIVISION

In re the Estate of:
Frances [sic] **E. Barg, a/k/a Frances** [sic] **Edward Barg,**
decedent.

Court File No: PX-04-0701

ORDER

The above-captioned matter came before Steven P. Ruble, District Court Judge, on August 4, 2005 pursuant to Mille Lacs County's petition for allowance of a claim against the estate of the decedent. Dawn R. Nyhus, Assistant Mille Lacs County Attorney, appeared on behalf of Mille Lacs County. Thomas J. Meinz appeared on behalf of the estate.

On January 31, 2005, the parties submitted a set of stipulated facts. On February 28, 2005, Mille Lacs County submitted its brief. On March 30, 2005, Attorney Meinz submitted a brief on behalf of the estate. Mille Lacs County submitted a reply brief on April 21, 2005.

STATEMENT OF FACTS

The parties are in agreement regarding the essential facts of this matter.

Francis and Dolores Barg were husband and wife for 55 years. On January 1, 2004, Dolores passed away. Francis died on May 27, 2004.

In December 2001, Dolores applied for Medical Assistance through Mille Lacs County. From December 1, 2001 until she died, Dolores received $108,413.53 in medical assistance. Francis never received medical assistance through the County.

The Bargs' primary asset during the course of their 55-year marriage was their homestead, in which Dolores and Francis each had a one-half share. Prior to her receipt of any medical assistance, Dolores transferred her one-half interest in the home to Francis. At or about the same time, she transferred her interest in other financial assets to her husband as well. There is no claim that any of these transfers were fraudulent; they were legal transfers that were permitted by federal law. When Francis died, the home was valued at $120,800.00. The total value of Francis Barg's estate was $146,446.29. All of the assets contained in his estate can be traced to assets that were jointly owned by Dolores and Francis during their marriage.

Michael Barg, the Barg's son, was nominated as personal representative for the estate of Francis Barg. The County filed a claim against Francis's estate for $108,413.53, the amount that Dolores received in medical assistance. Michael Barg honored only $63,880.00 of the County's claim. The County now seeks to recover the remaining $44,533.53.

CONCLUSIONS OF LAW

It is undisputed that in Minnesota a deceased spouse who received medical assistance benefits retains an interest in the estate of the surviving spouse, irrespective of whether the deceased spouse had transferred legal interest in marital property to the surviving spouse. *See Estate of Gullberg*, 652 N.W.2d 709, 713 (Minn.App. 2002) (because deceased recipient of medical assistance and his spouse were still married at time of his death, he had some legal interest in homestead he had earlier conveyed to his wife). In its *Gullberg* decision, the appellate court – without much explanation – expressly found the existence of this legal interest by favorably pointing to both marital-dissolution and intestate laws. *See Gullberg, Id.* (law recognizes spouses have common ownership interest in property acquired during coverture, regardless who holds title; homestead descends to surviving spouse free from any testamentary disposition to which surviving spouse has not consented). The Court is convinced that using intestacy law is appropriate here. (The Court's reasons for using intestacy law rather than marital-dissolution law will be discussed more fully in an attached memorandum of law, which is fully incorporated into this order.) The Court finds the following facts and legal conclusion to be relevant to its determination:

1. The conveyance that transferred the homestead – that had previously been held in joint tenancy by Dolores Barg and Francis Barg – from Dolores

Barg to Francis Barg constituted an "other arrangement" pursuant to 42 U.S.C. § 1369p(b)(4)(B).

2. Dolores Barg had a recognizable legal interest in the homestead property at the time of her death as discussed in the *Gullberg* decision, *supra*.

3. Dolores Barg's interest in the homestead at the time of her death was $58,880.00 pursuant to Minn. Stat. § 524.2-402(a)(2).

4. Dolores Barg was also entitled to a personal property allowance of $5,000.00 pursuant to Minn. Stat. § 524.2-403.

5. At the time of her death, then, Dolores Barg had an interest valued at $63,880.00.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 2, 2005

/s/ Steven P. Ruble
Steven P. Ruble
District Court Judge

Memorandum of Law

The Estate of [sic] *Estate of Gullberg*, 652 N.W.2d 709, (Minn.App. 2002) is the seminal Minnesota case dealing with the application of Minn.Stat. § 256B.15, Subd. 2 and 42 U.S.C. § 1396p(b)(4)(B) to a county's claim for reimbursement for medical assistance.

The court in *Gullberg* recognized that a spouse who does not have legal title to a homestead "continue[s] to have some legal 'interest' in [the] homestead because [the husband and wife] were still married at the time [of the non-title holding spouse's death.]." *Id.* at 713. That interest, according to the *Gullberg* court, exists "only to the extent of the value of the [medical assistance] recipient's interest in marital or jointly owned property at the time of the recipient's death." *Id.* at 714. In finding that such an interest exists, the *Gullberg* court found support in *Searles v. Searles*, 420 N.W.2d 581 (Minn. 1998). However, having relied both upon a marital dissolution case and intestacy law for support, the *Gullberg* court gave no direction to the lower courts as to which area of the law should be relied upon in determining the non-title holder's interest.

In the *Searles* case, the paramount issue was one of standing, and there the court found that spouses had a common ownership interest in property acquired during coverture and that that interest conferred standing upon those spouses. *Id.* at 583. These decisions, however, addressed neither the extent of nor the value to be placed on that interest. But by recognizing that ***some*** interest exists they implicitly acknowledge that the rights and interests of non-title holders are not synonymous with the right of common ownership. Therefore, these cases do not stand for the proposition that the common ownership interest of non-title holding spouses is equal to the total value of the homestead; on the contrary, they stand for the

proposition that the interest of the non-title-holding spouse and the total of the property are not identical.

In determining the value of Dolores Barg's interest at the time of her death, there is no agreement as to whether the approach to valuation should rely upon family law concepts or intestacy law.

Marital law lacks certainty as a method of valuation. The legal factors for valuation of assets in a marital dissolution setting are not suitable for a proceeding such as this one where the spouses are not the actual parties. The intestacy approach, therefore, will be adopted here.

The value of Dolores Barg's interest on the date of her death is as follows: (1) a life estate interest valued at $58,880.00 and (2) a personal property allowance of $5,000.00. A statutory family allowance, sought by the county, is conditional on a number of factors, including need. It is not automatically granted, and it is not applicable here.

/s/ SPR
SPR

722 N.W.2d 492

Court of Appeals of Minnesota.

In re the ESTATE OF Francis E. BARG, a/k/a Francis Edward Barg.

No. A05-2346.

Oct. 17, 2006.

Janice S. Kolb, Mille Lacs County Attorney, Dawn R. Nyhus, Assistant County Attorney, Milaca, MN, for appellant Mille Lacs County.

Thomas J. Meinz, Princeton, MN, for respondent personal representative.

Mike Hatch, Attorney General, Robin Vue-Benson, Assistant Attorney General, St. Paul, MN, for amicus curiae Minnesota Department of Human Services.

Considered and decided by LANSING, Presiding Judge; KLAPHAKE, Judge; and PARKER, Judge.*

OPINION

LANSING, Judge.

In this appeal from an order for partial recovery of medical benefits paid to Dolores Barg, the estate of

---

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Francis Barg [sic] challenges the district court's interpretation of Minnesota's estate-recovery statute, Minn.Stat. § 256B.15 (2004). Because we conclude that the determination of the deceased recipient's interest in transferred joint-tenancy property must be based on principles of real-property law as modified by specific provisions of the estate-recovery statute, we reverse and remand for recalculation of Mille Lacs County's allowable claim against the estate.

FACTS

Dolores and Francis Barg married in 1948. In 1962 and 1967 they acquired title to real property that they held in joint tenancy. In 2001 Dolores Barg's health declined, and she eventually required out-of-home nursing care. To pay for her medical care, she applied for long-term Medicaid benefits. After participating in an asset assessment, Dolores Barg transferred her interest in the jointly held property to Francis Barg. At the time of the transfer, the assessed value of the property was $120,800.

Dolores Barg died in 2004. Between 2001 and 2004, Dolores Barg received a total of $108,413.53 in medical-assistance benefits through the Medicaid program. Five months after Delores [sic] Barg's death, Francis Barg died, and his will was admitted to probate. Mille Lacs County filed a claim against the estate to recover the medical-assistance payments made to Dolores Barg. The estate's personal representative allowed $63,880 as a claim against the estate,

but disallowed $44,533.53. The county thereafter filed a claim-allowance petition.

At the hearing on the petition, the county contended that it was entitled to full recovery of its claim because the value of the real property exceeded the value of the claim and, as marital property, Dolores Barg was entitled to an undivided interest in its full value. The estate contended that the court should, instead, apply a probate-law analysis that would limit Dolores Barg's interest in the property to a life estate, with a value of $63,880.

Applying probate-law principles, the district court determined that Dolores Barg had a life-estate interest in the property and that the county could not recover the additional $44,533.53. The county appeals from this determination, and the Minnesota Department of Human Services has filed an amicus brief in support of the county's position.

ISSUE

Did the district court err by applying, for purposes of Minnesota's estate-recovery statute, a probate-law analysis to calculate a medical-assistance recipient's interest in transferred joint-tenancy property that is part of the surviving spouse's estate?

ANALYSIS

In the district court, Mille Lacs County and Francis Barg's estate jointly submitted a stipulation

of facts; on appeal, both acknowledge that the claim against the estate is governed by federal and state statutes. Application of a statute to undisputed facts involves a question of law. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn.1996). We review questions of law de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue,* 488 N.W.2d 254, 257 (Minn.1992).

Medicaid is a cooperative program between states and the federal government in which the federal government provides financial assistance to participating states. *Martin ex rel. Hoff v. City of Rochester,* 642 N.W.2d 1, 9 (Minn.2002). Participating states design their own Medicaid plans and set guidelines for eligibility and participation, but these plans must comply with federal law. *Id.* at 11.

Under Medicaid, a person who is unable to pay the cost of long-term medical care may qualify for medical-assistance benefits. *See Women of State of Minn. by Doe v. Gomez,* 542 N.W.2d 17, 21 (Minn.1995) (stating that Medicaid provides benefits for "medically needy"). If the person has income or assets that exceed the limits for eligibility, the person will not qualify for benefits until the available resources that exceed the eligibility level are expended. *In re Estate of Atkinson v. Minn. Dep't of Human Servs.*, 564 N.W.2d 209, 211 (Minn.1997). Because the "spend down" requirement has the potential to impose substantial hardship on the spouse of a medical-assistance recipient, Medicaid includes provisions to avoid spousal impoverishment. *Id.* These anti-impoverishment measures preclude certain assets

from being considered for eligibility purposes. *Id.* Specifically, in determining eligibility for Medicaid benefits, the value of an individual's home is not considered so long as a spouse or dependent child maintains the home as a primary residence. Minn.Stat. § 256B.056, subd. 2 (2004).

Because the spousal anti-impoverishment measures provide an exemption for a primary residence, this property is typically an asset that is subject to estate-recovery procedures. *In re Estate of Gullberg,* 652 N.W.2d 709, 714 (Minn.App.2002). To reach these assets, Congress amended the Medicaid Act to expand the government's ability to recover from the estates of medical-assistance recipients and to require states to seek this recovery. *See id.* at 712. Although the Medicaid Act does not generally permit the government to recover medical assistance correctly paid on behalf of an individual, the government may seek recovery if one of three exceptions applies. 42 U.S.C. § 1396p(b)(1) (2000). The exception relevant to the Bargs' circumstances applies to individuals who were older than fifty-five when they received medical assistance. *Id.* § 1396p(b)(1)(B). Under this exception, the government may recover "from the individual's estate," but may only seek recovery after the death of the individual's surviving spouse. *Id.* § 1396p(b)(1)(B), (b)(2).

For purposes of recovery, federal law defines an individual's estate as "all real and personal property and other assets included within the individual's estate, as defined for purposes of [s]tate probate law."

Id. § 1396p(b)(4)(A) (2000). The federal law, however, permits states to expand the definition of estate beyond the definition found within probate law. *Id.* § 1396p(b)(4)(B) (2000). If the state chooses, it may include "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed . . . through joint tenancy . . . or other arrangement." *Id.*

Minnesota's estate-recovery statute provides that the state may assert a claim against the estate of a surviving spouse to recoup medical-assistance benefits provided to the predeceased spouse. Minn.Stat. § 256B.15, subd. 1a (2004). The Minnesota statute thus reflects the legislature's exercise of the option to expand the definition of estate to allow claims against the surviving spouse's estate. *Gullberg,* 652 N.W.2d at 713. But Minnesota limits a "claim against the estate of a surviving spouse . . . to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn.Stat. § 256B.15, subd. 2 (2004). Thus, the state may not recover from portions of a surviving spouse's estate that are not traceable to marital or jointly owned property.

In *Gullberg,* 652 N.W.2d at 714, this court determined that Minnesota's statute was partially preempted by federal law. Specifically, the court concluded that Minnesota's estate-recovery statute goes further than permitted by federal law because it permits recovery "to the value of the assets of the

estate that were marital property," while the federal law only permits recovery "to the extent of" the individual's interest at the time of death. *Id.* To harmonize federal and state law, *Gullberg* concluded that Minnesota's estate-recovery statute "allows claims against a surviving spouse's estate only to the extent of the value of the recipient's interest in marital or jointly owned property at the time of the recipient's death." *Id.* Recovery is thus limited to "the value of the recipient's interest in those assets at the time of the recipient's death." *Id.*

Prior to *Gullberg,* the state could recover up to the full value of assets that could be traced back to marital or jointly owned property. *See* Minn.Stat. § 256B.15, subd. 2. After *Gullberg,* the state's ability to recover was limited to the recipient's interest in marital or jointly owned property at the time of the recipient's death. *Gullberg,* 652 N.W.2d at 714. Thus, the state's recovery depends on a determination of the recipient's interest in the specified assets at the time of death.

The county and the estate argue that *Gullberg* restricts the definition of the value of the recipient's interest in the estate of the surviving spouse to either probate-law or marital-property-law principles. The county contends that marital-property-law principles should be applied because the estate-recovery statute specifically refers to marital property. The estate counters that a recipient's interest is more appropriately determined by reference to probate law. We conclude that both the county and the estate read too

much into *Gullberg's* passing references to marital and probate law.

Gullberg's holding was limited to the narrow issue of preemption. *Id.* at 712, 714. Rather than directly addressing the method for calculating the extent of the recipient's interest in transferred property, the court in *Gullberg* remanded the issue to the district court for determination of the recipient's interest in the assets of the surviving spouse's estate. *Id.* at 714-15. Although the *Gullberg* decision included citations to a marital-property-law case, *Searles v. Searles,* 420 N.W.2d 581 (Minn.1988), and to a probate statute, Minn.Stat. § 524.2-402(a), (c) (2000), these citations were included merely as support for the precept that a medical-assistance recipient may continue to have some interest in property even after the recipient has transferred the property to a spouse. *Gullberg,* 652 N.W.2d at 713. Notably, *Gullberg* stated that the recipient's transfer of his joint tenancy to his spouse was a conveyance by "other arrangement" and that it would therefore fall within the broader optional state definition of estate. *Id.* Thus the *Gullberg* opinion essentially applied the optional definition of estate, as allowed by federal law, and established that the medical-assistance recipient had *some* interest in the homestead after its conveyance, but the opinion did not address the extent of this interest. *Id.*

We therefore reject the parties' competing arguments that *Gullberg* must be read to require either a probate-law analysis or a marital-property-law analysis

when calculating a medical-assistance recipient's interest under the estate-recovery laws. We are not persuaded that either analysis applies, particularly in this case. Analysis under marital-property law would require us to read into the estate-recovery statute a definition from Minn.Stat. § 518.54 (2004), which explicitly restricts its definitions to the context of marital dissolution, and provides that marital property "means property . . . acquired by the parties, or either of them, to a dissolution, legal separation, or annulment proceeding." *Id.* § 518.54, subds. 1, 5. We are unable to find a legal basis for incorporating this definition into the estate-recovery statute. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114-17 (Minn.2001) (stating that rules of statutory construction prohibit adding words or meaning to statute when legislature has not).

We are similarly unable to find a legal basis for imposing a probate-law analysis, which would require the court to apply a retrospective structuring of the medical-assistance recipient's interest in the surviving spouse's estate. This method, which was proposed by the estate and accepted by the district court, results in a life-estate interest that is based on an artificial assumption that the surviving spouse predeceased the recipient instead of the converse. In this case, Francis Barg did not include a provision for his deceased wife and left his interest in his homestead to his children. Under probate-law principles, the court would have to assume that Dolores Barg

survived her husband and received a life-estate interest in his property as his surviving spouse.

This probate-law analysis would also conflict with the estate-recovery laws, which require courts to calculate the recipient's interest at the time of the recipient's death rather than on the future date of the spouse's death. The estate-recovery statute specifically provides that a recipient's joint-tenancy interests "shall not be merged into the remainder interest or the interests of the surviving joint tenants" and that the joint-tenancy interests shall be subject to the provisions of the statute. Minn.Stat. § 256B.15, subd. 1(5) (2004); *see also In re Estate of Jobe*, 590 N.W.2d 162, 165 (Minn.App.1999) (stating that statutory language extends definition of estate to include nonprobate assets), *review denied* (Minn. May 26, 1999). Analysis under probate-law principles is also inconsistent with the federal law's expanded definition of estate, which explicitly allows a state to broaden the definition beyond the meaning used in probate law and to include joint-tenancy interests that have been previously conveyed to a spouse. 42 U.S.C. § 1396p(b)(4).

In light of the problems with the use of either probate-law or marital-property-law principles, we conclude that the plain meaning of the estate-recovery statute requires us to apply property-law principles as specifically modified by the statute. Applying this analysis, a recipient's interest in marital property for purposes of estate recovery is limited to that person's legal interest in the property at the

time of death. And, under federal law and *Gullberg*, this interest includes a conveyance of a joint tenancy to a spouse. *See id.* § 1396p(b)(4)(B); *Gullberg*, 652 N.W.2d at 713 (stating that recipient maintains joint-tenancy interest in property even after conveyance to spouse because conveyance constitutes "other arrangement").

Applying *Gullberg*, the relevant statutes, and the principles of property law to the stipulated facts, we start from the elemental threshold that Dolores Barg had a joint-tenancy interest in the property that is now in Francis Barg's estate and that her interest was acquired during their marriage. Before receiving Medicaid benefits [sic], she conveyed her interest in the property to Francis Barg. For purposes of the estate-recovery statute, Dolores Barg's estate retained a joint-tenancy interest in the homestead at the time of her death. *See* Minn.Stat. § 256B.15, subd. 1(3) (providing for modification of common law principles by allowing continuation of medical-benefit recipient's joint-tenancy interest after recipient's death). The "extent of her interest" is defined by the joint tenancy. A joint tenant's interest in property is an undivided one-half interest in the property's value. *Kipp v. Sweno*, 683 N.W.2d 259, 260, 263 (Minn.2004). Because the stipulated facts state that the joint-tenancy property was valued at $120,800 at the time of Dolores Barg's death, the extent of the value of Dolores Barg's interest at the time of her death was $60,400. We therefore reverse and remand

for the district court to recalculate the allowable claim against Francis Barg's estate.

Finally, the Minnesota Department of Human Services filed an amicus brief in this case, supporting the county's position and urging reversal of the district court's decision. The department advances two independent arguments for reversal. First it asserts that *Gullberg's* discussion of the preemptive effect of the phrase "to the extent of such interest" is dictum and should not be applied. We disagree. The *Gullberg* court did not exceed the scope of review on the preemption issue by relying on a full-text analysis of the federal act. The language of the opinion and the stated issue in the case establish that *Gullberg* squarely addresses preemption and reaches a conclusion on this issue, which became the holding of the case. *Gullberg,* 652 N.W.2d at 712, 714.

Second, the department urges this court to reverse *Gullberg* based on the department's "more complete discussion" of the preemption issue in its amicus brief. The amicus brief provides a thoughtful and comprehensive analysis of the preemption question. But that issue was decided in *Gullberg,* and nothing in *Gullberg's* analysis suggests that the court did not consider the full spectrum of applicable law and competing policy considerations in its determination of the preemption issue. We therefore decline to reverse *Gullberg.*

DECISION

For purposes of obtaining reimbursement under Minnesota's estate-recovery statute, Mille Lacs County is entitled to a claim against Francis Barg's estate for Dolores Barg's one-half interest in the joint-tenancy property obtained during the marriage and transferred to Francis Barg. Because the district court erred by applying a probate-law method of calculation, we reverse and remand for a recalculation of the allowance based on principles of real property as modified by specific provisions of the estate-recovery statutes.

Reversed and remanded.

STATE OF MINNESOTA

IN SUPREME COURT

A05-2346

In re the Estate of: Francis E. Barg,
a/k/a Francis Edward Barg

ORDER

(Filed Jul. 21, 2008)

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petitions for rehearing in the above-entitled matter be, and the same are, denied.

DATED: July 21, 2008

BY THE COURT:

/s/ Helen M. Meyer
Helen M. Meyer
Associate Justice

MAGNUSON, C.J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

ANDERSON, Paul H., J., took no part in the consideration or decision of this case.

DIETZEN, J., not having been a member of this court at the time of the argument and submission,

took no part in the consideration or decision of this case.

CONSTITUTION OF THE UNITED STATES

Article I, Section 8

The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * – And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

UNITED STATES CODE

(2000 edition, Supplement V)

TITLE 42
THE PUBLIC HEALTH AND WELFARE

CHAPTER 7
SOCIAL SECURITY

SUBCHAPTER XIX
GRANTS TO STATES FOR
MEDICAL ASSISTANCE PROGRAMS

[EXCERPTS]

42 U.S.C. Sec. 1396. Appropriations

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

* * *

42 U.S.C. Sec. 1396a. State plans for medical assistance

a) Contents

A State plan for medical assistance must –

* * *

(17) * * * include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * *

(D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 * * * ;

(18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;

* * *

42 U.S.C. Sec. 1396d. Definitions

For purposes of this subchapter –

(a) Medical assistance

The term "medical assistance" means payment of part or all of the cost of the following care and services * * *

42 U.S.C. Sec. 1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except –

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual –

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if –

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title, or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution),

is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an

individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of –

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State

which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources –

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time –

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B) of this section, when –

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home

for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual –

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor,

heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(c) Taking into account certain transfers of assets

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

(B)(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to –

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

(C)(i) The services described in this subparagraph with respect to an institutionalized individual are the following:

(I) Nursing facility services.

(II) A level of care in any institution equivalent to that of nursing facility services.

(III) Home or community-based services furnished under a waiver granted under subsection (c) or (d) of section 1396n of this title.

(ii) The services described in this subparagraph with respect to a noninstitutionalized individual are services (not including any services described in clause (i)) that are described in paragraph (7), (22), or (24) of section 1396d(a) of this title, and, at the option of a State, other long-term care services for which medical assistance is otherwise available under the State plan to individuals requiring long-term care.

(D) The date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to –

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to –

(I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

(II) the average monthly cost to a private patient of nursing facility services in the

State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced –

(I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and

(II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that –

(A) the assets transferred were a home and title to the home was transferred to –

(i) the spouse of such individual;

(ii) a child of such individual who (I) is under age 21, or (II) (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is

blind or disabled as defined in section 1382c of this title;

(iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

(iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(B) the assets –

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration, (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or (iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary;

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term "resources" has the meaning given such term in section 1382b of this title, without regard to the exclusion described in subsection (a)(1) thereof.

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

(ii) The individual's spouse.

(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.

(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to –

(i) the purposes for which a trust is established,

(ii) whether the trustees have or exercise any discretion under the trust,

(iii) any restrictions on when or whether distributions may be made from the trust, or

(iv) any restrictions on the use of distributions from the trust.

* * *

(e) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action –

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

* * *

42 U.S.C. Sec. 1396r-5. Treatment of income and resources for certain institutionalized spouses

* * *

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse) –

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to \1/2\ of such total value.

* * *

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property –

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

* * *

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include –

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

* * *

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who –

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

* * *

MINNESOTA STATUTES

2006

Chapter 256B
Medical Assistance for Needy Persons

§ 256B.15
Claims Against Estates

[EXCERPTS]

Subdivision 1. **Policy and applicability.**

(a) It is the policy of this state that individuals or couples, either or both of whom participate in the medical assistance program, use their own assets to pay their share of the total cost of their care during or after their enrollment in the program according to applicable federal law and the laws of this state.

* * *

Subd. 1a. **Estates subject to claims.**

If a person receives any medical assistance hereunder, on the person's death, if single, or on the death of the survivor of a married couple, either or both of whom received medical assistance, or as otherwise provided for in this section, the total amount paid for medical assistance rendered for the person and spouse shall be filed as a claim against the estate of the person or the estate of the surviving spouse in the court having jurisdiction to probate the estate or to issue a decree of descent according to sections 525.31 to 525.313.

A claim shall be filed if medical assistance was rendered for either or both persons under one of the following circumstances:

(a) the person was over 55 years of age, and received services under this chapter;

* * *

Subd. 2. **Limitations on claims.** The claim shall include only the total amount of medical assistance rendered after age 55 or during a period of institutionalization described in subdivision 1a, clause (b), and the total amount of general assistance medical care rendered, and shall not include interest. Claims that have been allowed but not paid shall bear interest according to section 524.3-806, paragraph (d). A claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage.

* * *

Department of Health & Human Services
Centers for Medicare & Medicaid Services
233 North Michigan Avenue, Suite 600
Chicago, Illinois 60601-5519

[LOGO]

JUN 27 2007

Ms. Christine Bronson
Medicaid Director
Minnesota Department of Human Services
P.O. Box 64998
St. Paul, Minnesota 55164

Dear Ms. Bronson:

Enclosed for your records is an approved copy of the following State Plan Amendment:

Transmittal #07-005 Third Party Liability and Recovery; Estate Recovery – Effective Date – January 1, 2007

If you have any additional questions, please have a member of your staff contact Doris Ross at (312) 353-9843.

Sincerely,

/s/ Verlon Johnson
Verlon Johnson
Associate Regional Administrator
Division of Medicaid &
Children's Health

cc: Lisa Knazan, MDHS

Enclosure

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

FORM APPROVED
OMB NO. 0938-0193

TRANSMITTAL AND NOTICE OF APPROVAL OF STATE PLAN MATERIAL **FOR: HEALTH CARE FINANCING ADMINISTRATION**	1. Transmittal Number: 007-05	2. State MN
	3. Program Identification: Title XIX Of The Social Security Act (Medicaid)	
To: Regional Administrator Health Care Financing Administration Department Of Health And Human Services	4. Proposed Effective Date January 1, 2007	

90a

5. Type Of Plan Material *(Check One)*:
☐ New State Plan ☐ Amendment To Be Considered As New Plan X Amendment

Complete Blocks 6 Thru 10 If This Is An Amendment *(Separate Transmittal for each amendment)*

6. Federal Statute/Regulation Citation: §1925(a) (25)(G) and (H) §1917(b)	7. Federal Budget Impact: a. FFY '07 $ 0 b. FFY '08 $ 0
8. Page Number Of The Plan Section Or Attachment ~~Pages 59a~~, 69, 69a, 70 Attachment 4.22-A Attachment 4.22-B Attachment 4.17-A	9. Page Number Of The Superseded Plan Section Or Attachment *(If Applicable)*:

10. Subject Of Amendment:
Third party liability and recovery; estate recovery

11. Governor's Review *(Check One)*:
X Governor's Office Reported No Comment ☐ Other, As Specified:
☐ Comments Of Governor's Office Enclosed
☐ No Reply Received Within 45 Days Of Submittal

12. Signature Of State Agency Official: s/Christine Bronson	16. Return To: Ann Berg (for Christine Bronson) Minnesota Department of Human Services P.O. Box 64983 540 Cedar Street St. Paul, MN 55154-0983
13. Typed Name: Christine Bronson	
14. Title: Medicaid Director	
15. Date Submitted March 28, 2006	

FOR REGIONAL USE ONLY

17. Date Received:	18. Date Approved: JUN 27 2007
Plan Approved - One Copy Attached	
19. Effective Date Of Approved Material: January 1, 2007	20. Signature Of Regional Official: s/Verlon Johnson
21. Typed Name:	22. Title: Associate Regional Administrator

23. Remarks
(Received Mar 30 2007 DMCH – ARA)

* * *

STATE: MINNESOTA Attachment 4.17-A
Effective: January 1, 2007 Page 1
TN 07-05
Approved: JUN 27 2007
Supersedes: TN 06-10, 05-12B, 03-33, 95-34 and 93-42, and 90-30.

LIENS AND ADJUSTMENTS OR RECOVERIES

1. The state uses the following process for determining that an institutionalized individual cannot reasonably be expected to be discharged from the medical institution and return home:

The State requests verification from the attending physician of the institutionalized individual's status immediately preceding giving notice of the State's intent to file a real property lien.

2. The following criteria are used for establishing that a permanently institutionalized individual's son or daughter provided care as specified under regulations at 42 CFR 433.36(f):

The State uses the following criteria:

*written proof verifying the date the son or daughter moved into the home;

*number of hours per day which the son or daughter provided on-site care, and personal care;

*any part-time or full-time jobs held while providing care;

*any schools or other similar institutions the son or daughter attended while providing care;

*specifics regarding the type of care the son or daughter provided, i.e., nursing care, daily living care, homemaker services, transportation, financial, etc.;

*any service agency, governmental or private, which provided care, the dates provided and the extent of the care provided;

*letter from the attending physician of the institutionalized individual, stating what kind of care, and duration of care, that was needed to prevent medical institutionalization;

*all other factors relevant to making the determination in a particular case.

3. *The State defines the terms below as follows:*

*_estate_ – For recipients deceased prior to August 1, 2003, estate is defined as used in Minnesota Statutes, Chapter 524, Uniform Probate Code. For recipients who die on or after August 1, 2003, estate is defined as the probate estate under Minnesota Statutes, Chapter 524, together with all of the person's interests established on or after August 1, 2003 or proceeds from those interests in real property owned by the person as a life tenant or joint tenant with a right of survivorship at the time of death, and to the extent the following interests become part of the probate estate, all interests or proceeds of those interests in securities owned by the person in beneficiary form and all interests in joint accounts, multiple party accounts and pay on

death accounts or proceeds of those accounts. *Minnesota also recovers from the estate of the deceased spouse of a predeceased Medicaid recipient according to Minnesota Statutes 256B.15. Recovery of a claim against the estate of a spouse who did not receive medical assistance ("nonrecipient spouse"), for medical assistance paid on behalf of his or her predeceased spouse, applies to the full value of all assets and interests in the estate of the nonrecipient spouse that were property of or can be traced to property held by the recipient spouse or the nonrecipient spouse or both during the marriage. Any assets, proceeds of assets and income from such assets, that were jointly owned property at any time during the marriage or marital property including all property in which either spouse had an interest at the time of marriage and property acquired by either or both during the marriage, regardless of how acquired, titled or owned are subject to recovery. Recovery in the estate of the nonrecipient spouse does not apply to assets attributable to a subsequent spouse when the nonrecipient spouse has remarried, or to assets acquired individually with non-marital assets or interests by the nonrecipient spouse after the death of the recipient spouse.*

* * *

115

(2)

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-603

IN THE

Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

THOMAS J. MEINZ
107 Sixth Avenue South
Princeton, MN 55371
(763) 389-1243

Counsel for Respondent

220189

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to justify a Writ of Certiorari to review the unanimous judgment of the Minnesota Supreme Court that the Minnesota Medical Assistance estate recovery statute, Minn. Stat. § 256B.15, is partially preempted by the federal statute, 42 U.S.C. § 1396p(b)(4)(B), to the extent the Minnesota statute requires recovery against assets in which a medical assistance recipient did not have, under state law, a legal title or interest of value at the time of the recipient's death.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
Material Stipulated Facts	2
District Court Decision	3
Minnesota Court of Appeals Decision	4
Minnesota Supreme Court Decision	5
REASONS FOR DENYING THE PETITION	7
I. The Minnesota Supreme Court Determined Minnesota's Medical Assistance Recovery Law Is Partially Preempted by Federal Law	8
II. The Plain Language of 42 U.S.C. Regarding Transfers by "Other Arrangement" Is Misconstrued by Petitioner	9
III. Federal Law Does Not Make Spouses Jointly Liable for Reimbursement of Medical Assistance Received by Only One Spouse	12

Contents

Page

IV. The Minnesota Supreme Court Applied Minnesota Law to Determine That Recipient Dolores Barg Had No Interest of Value in Any Asset of Her Spouse at the Time of Her Death 14

V. Courts of Other Jurisdictions Agree with the Minnesota Supreme Court Decision 16

VI. The Minnesota Supreme Court's Refusal to Defer to Approval of Minnesota's State Medicaid Plan by the Centers for Medicare and Medicaid Services Is Not a Compelling Reason to Approve This Petition 18

VII. The Petitioner Ignores the Plain Language of the Federal Statute in Favor of Broad Public Policy Arguments 19

VIII. Petitioner Relies on Misstatements and Innuendo as a Substitute for Compelling Reasons to Grant Its Petition for This Court's Review. 20

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases

In re Estate of Budney, 541 N.W.2d 245 (Wis. Ct. App. 1995) 16, 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) .. 18-19

In re Estate of Gullberg, 652 N.W.2d 709 (Minn. Ct. App. 2002) 4, 6, 15, 24

Hines v. Department of Public Aid, 850 N.E.2d 148 (Ill. 2006) 16, 17

Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1 (Minn. 2002) 18, 19

In re Estate of Smith, 2006 WL 3114250 (Tenn. Ct. App. 2006) 17, 18

In re Estate of Thompson, 586 N.W.2d 847 (N.D. 1998) 10

In re Estate of Wirtz, 607 N.W.2d 882 (N.D. 2000) 9, 10, 11, 18

Cited Authorities

Page

Federal Statutes

42 U.S.C. § 1396p 8

42 U.S.C. § 1396p(b) 4, 10, 20

42 U.S.C. § 1396p(b)(1) 1

42 U.S.C. § 1396p(b)(1)(B) 1, 8

42 U.S.C. § 1396p(b)(4) 21

42 U.S.C. § 1396p(b)(4)(A) 21

42 U.S.C. § 1396p(b)(4)(B) ..... i, 9, 10, 12, 13, 21

42 U.S.C. § 1396p(c)(2) 25

42 U.S.C. § 1396p(e)(1) 12

42 U.S.C. § 1396r-5(f) 17

Minnesota Statutes

Minn. Stat. § 256B.15 ..... i, 1

Minn. Stat. § 256B.15, Subd. 2 ..... 4, 6, 15

Minn. Stat. § 524.2-403 4

Cited Authorities

Page

Rule

Supreme Court Rule 10 ..... 7, 19

Other Authority

Omnibus Budget Reconciliation Act of 1993 ... 8

STATEMENT OF THE CASE

This case concerns the conflict between the language of the federal medical assistance recovery statute and the Minnesota recovery statute. Federal Medicaid recovery law, as expressed in 42 U.S.C. § 1396p(b)(1), restricts recovery. The statute begins with the language

> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals: . . . .

Of the three exceptions in which recovery is allowed, only one is applicable. Title 42 U.S.C. § 1396p(b)(1)(B) states: "In the case of an individual who is 55 years of age or older when the individual received medical assistance, the State shall seek adjustment or recovery from the *individual's estate*. . . ." (emphasis supplied). Minn. Stat. § 256B.15 requires that medical assistance benefits correctly paid on behalf of a deceased recipient be recovered from the estate of that recipient's surviving spouse, limited only to the value of assets of the *surviving spouse's estate* that were marital property or jointly owned property at any time during the marriage. The Minnesota statute therefore requires recovery of assets from the surviving spouse's probate estate which were transferred by the recipient to the surviving spouse during the recipient's lifetime.

Dolores Barg, the predeceased medical assistance recipient, made certain asset transfers to her spouse during her lifetime. These assets were protected for Dolores' spouse under Medical Assistance program guidelines. Transfer of these assets was required by program guidelines if they were to remain protected for the spouse. They were proper, required by Petitioner, and not fraudulent. Following transfer, the deceased recipient had no legal title or other interests of value in these assets during her lifetime and no interest of value in these assets at the time of the recipient's death. The Minnesota Supreme Court held that the federal statute partially preempts the Minnesota statute and prohibits recovery of medical assistance benefits from the Estate of Francis E. Barg under the facts of this case.

Material Stipulated Facts

Dolores J. Barg was born in 1926, married Francis E. Barg in 1948, and remained married to him until her death in January 2004. In 1962 and 1967, Francis and Dolores Barg took title as joint tenants to real property in Princeton, Minnesota, which qualified for homestead treatment under medical assistance guidelines. On October 24, 2001, Dolores Barg entered a nursing home in Mille Lacs County, Minnesota, and began paying privately for care. In December 2001, she applied for Medicaid benefits for long-term care. An asset assessment was completed in February 2002. The Bargs' marital assets, including their homestead, totaled $137,272.63. Dolores Barg received approval for long-term benefits effective December 1, 2001. On July 2, 2002, Dolores Barg, acting through her guardian, and pursuant to Court order, transferred her joint tenancy

interest in the homestead property to her husband Francis Barg. In July 2002, the guardian also terminated Dolores Barg's ownership in certain certificates of deposit previously held jointly by the couple. There is no allegation that these actions were improper or fraudulent.

Dolores Barg died January 1, 2004, after receiving $108,413.53 in Medicaid benefits. Francis Barg died May 27, 2004, having never received Medicaid benefits. At the time of Francis Barg's death, the homestead, legally titled in his name alone, was valued at $120,800. Francis Barg's Last Will nominated his son Michael F. Barg to serve as Personal Representative. The Will left Francis Barg's estate to his surviving descendants, making no provision for his deceased wife Dolores.

On July 30, 2004, Petitioner Mille Lacs County filed a claim against the probate estate of Francis Barg, seeking recovery of $108,413.53, the full amount of benefits paid on behalf of Dolores Barg. The Personal Representative disallowed $44,533.53 of the claim and allowed $63,880. Petitioner Mille Lacs County then petitioned the District Court to allow the full claim.

District Court Decision

The Mille Lacs County District Court awarded Mille Lacs County $63,880, which was the amount of the claim previously allowed by the Personal Representative. This award included the $58,880 Minnesota Department of Human Services valuation of Dolores' life estate in the homestead at the time of her death, and a $5,000 personal property allowance for a *surviving spouse*

pursuant to Minn. Stat. § 524.2-403, even though Dolores predeceased her husband Francis. The District Court based its decision on *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). In *Gullberg*, the Court of Appeals determined that although a predeceased recipient spouse had transferred all legal title to his homestead to his surviving spouse before his death, the predeceased spouse still had "some legal interest" in the homestead because the parties were married at the time of the predeceased spouse's death. The *Gullberg* court remanded the case to District Court to determine the nature and characteristics of that interest, but the case was settled without the District Court making any findings on this issue. The *Gullberg* Court suggested that the value of the interest might be determined either by application of a marital property analysis, or by application of the intestacy statutes in favor of a surviving spouse. The Court determined that 42 U.S.C. § 1396p(b) partially preempted Minn. Stat. § 256B.15, Subd. 2, to the extent that Minnesota law required recovery against the probate estate of the *non-recipient surviving spouse* up to the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*. The County appealed.

Minnesota Court of Appeals Decision

The Court of Appeals granted the petition of the Minnesota Commissioner of Human Services to participate in oral argument. The Court of Appeals, also relying on *Gullberg*, agreed that the County's ability to recover against the estate of the surviving spouse was limited to the recipient's interest in marital or jointly

owned property at the time of the recipient spouse's death. *Barg* at 496. However, the Court decided that Dolores Barg retained a joint tenancy interest in the homestead at the time of her death even though she had *conveyed* the homestead by guardian's quit claim deed to her spouse *during her lifetime*. The Court valued the interest as an undivided one-half interest and remanded the case to the District Court to recalculate the value of the allowable claim. The County petitioned the Minnesota Supreme Court for discretionary review.

Minnesota Supreme Court Decision

The Minnesota Supreme Court granted the County's petition for discretionary review of the District Court's judgment. The Court also granted the Personal Representative's request for review of the question whether federal law prohibited recovery from a non-recipient spouse's estate under the stipulated facts. The Court granted the requests of the Minnesota Commissioner of Human Services, represented by the Minnesota Attorney General, to file an *amicus curiae* brief supporting the County and to participate in oral argument. The Elder Law Section of the Minnesota State Bar Association and The National Senior Citizens Law Center were granted leave to jointly file an *amici curiae* brief supporting the Estate of Francis E. Barg. The Minnesota Supreme Court heard oral argument and requested supplemental briefs following oral argument to clarify how some amendments of the Minnesota recovery statutes in 2005 affected the scope of recovery allowed under Minnesota law.

Following submission of the supplemental briefs, the Minnesota Supreme Court held that federal Medicaid law does not prohibit all recovery from the estate of a surviving spouse who did not receive Medicaid benefits, but that federal law does not allow recovery from assets in the probate estate of a non-recipient surviving spouse if the recipient did not have an interest of value in those assets at the time of the recipient's death. The Court, citing the plain language of the federal statute, disagreed with the decision of the Minnesota Court of Appeals in *Barg* and by implication limited the decision of the Court of Appeals in *Gullberg*. The Court concluded that

> . . . for an interest to be . . . recoverable from a surviving spouse's estate, the interest must be (1) an interest recognized by law, (2) which the Medicaid recipient held at the time of death, and (3) that resulted in a conveyance of an interest of some value to the surviving spouse that occurred as a result of the recipient's death.

(Pet. App. at 39a). The Court decided that Minn. Stat. § 256B.15, Subd. 2, was therefore preempted by federal law "to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have a legal interest at the time of death, and to the extent that it permits recovery beyond the extent of the recipient's interest." (Pet. App. at 43a).

The Minnesota Court summarized its conclusion

> We conclude that Dolores had no interest in assets at the time of her death that were part of a probate estate or an expanded estate definition permissible under federal law, and therefore there is no basis for the County's claim against the Estate.

(Pet. App. at 40a).

REASONS FOR DENYING THE PETITION

No compelling reasons have been presented by Petitioner as a basis for granting the Petition. *See* Sup. Ct. R. 10. The thorough, well-reasoned unanimous Opinion of the Minnesota Supreme Court is supported by the decisions of several other state Supreme Courts and Courts of Appeals. The only conflict of authority is with one other state Supreme Court, which did not appear to fully review the federal statute governing medical assistance recovery. The Minnesota Supreme Court upheld the federal law but limited the application of those portions of the Minnesota recovery statute which the Court found directly in conflict with the federal statute. Petitioner is seeking review to obtain a judicial decision which ignores the public policy decisions enunciated by Congress in the federal Medicaid recovery statute, rather than seeking a legislative change. The Petitioner is seeking review because it disagrees with the plain language and policy of the federal statute.

I. *The Minnesota Supreme Court Determined Minnesota's Medical Assistance Recovery Law Is Partially Preempted by Federal Law*

The Minnesota Supreme Court began its analysis by thoroughly examining whether federal law preempts Minnesota law. The Minnesota Court recognized that "Our primary focus in the analysis must be to ascertain the intent of Congress." The Court noted a U.S. House Report describing the amendments made by the Omnibus Budget Reconciliation Act of 1993 to 42 U.S.C. § 1396p. The Court pointed out, "When the House wanted to describe recovery from the surviving spouse's estate, it said so clearly." Importantly, the Court noted that the amendments to 42 U.S.C. § 1396p(b)(1)(B) actually passed by Congress in 1993 eliminated the House reference to recovery from the surviving spouse's estate and focused recovery on the *recipient's estate alone*. The federal statute as adopted, the Court stated, "contained no express authorization for, or reference to, recovery from a surviving spouse's estate." (Pet. App. at 11a). The Minnesota Supreme Court looked carefully at the federal statutory language to determine whether it preempted Minnesota law "to the extent it actually conflicts with federal law." The Court decided that Congress did not intend to preclude all recovery from the estate of a surviving spouse, but concluded that, "There is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death." (Pet. App. at 36a). The Court stated, "The language of the federal law clearly limits" the expanded definition of estate in the 1993 amendments "to assets in which the recipient had an interest at the

time of her death." (Pet. App. at 36a, 37a). Therefore, the Court determined the Minnesota recovery statute "is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly owned property *at any time during the marriage*. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient *at the time of her death*." (emphasis supplied) (Pet. App. at 37a).

II. *The Plain Language of 42 U.S.C. Regarding Transfers by "Other Arrangement" Is Misconstrued by Petitioner*

Petitioner Mille Lacs County argues that the Minnesota law allowing recovery against the estate of the surviving spouse allows Minnesota to recover the value of assets of the surviving spouse's estate "that were marital property or jointly owned property at any time during the marriage." This Minnesota language includes assets lawfully transferred by the predeceased recipient spouse prior to the recipient's death. In support of this position, the County argues that the language of 42 U.S.C. § 1396p(b)(4)(B) allowing recovery of assets transferred by the recipient through "other arrangement" includes transfers made by the recipient to the recipient's surviving spouse at any time during the marriage and includes assets transferred *prior* to recipient's death. The County relied heavily on the decision of the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The

Minnesota Court rejected the County's argument, stating that this argument would:

> take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language. Significantly, no Court has embraced the County's argument that the pre-1993 federal law authorized recovery from a surviving spouse's estate of assets that were jointly owned during the marriage but transferred by the recipient spouse prior to her death. Indeed, of the Courts that have interpreted federal law to allow direct claims against the estate of a surviving spouse, only one has construed that authority to extend to assets that were transferred before the death of the Medicaid recipient, and that Court relied on the language from the 1993 amendments to support that extension. (Pet. App. at 31a, 32a).

The one court at variance with the other courts was the North Dakota Supreme Court in *Wirtz*. The *Wirtz* Court relied primarily on the words "other arrangement" at the end of § 1396p(b)(4)(B). The North Dakota Court characterized the term "other arrangement" as being ambiguous and therefore allowed the State wide latitude in seeking Medicaid reimbursement. The Minnesota Supreme Court noted that prior to *Wirtz*, the North Dakota Supreme Court in *In re Estate of Thompson*, 586 N.W.2d 847 (N.D. 1998), decided that recovery allowed under § 1396p(b) is *limited to assets in which the Medicaid recipient had*

an interest at the time of death. The Court then stated, however, that the *Wirtz* Court later determined that the Congressional intent in that law allows states "wide latitude in seeking Medicaid benefit recoveries." Pointedly, the Minnesota Court noted that the *Wirtz* Court *did not explain* why it abandoned the restriction acknowledged in *Thompson* when it allowed broader recovery in *Wirtz*.

The Minnesota Supreme Court thoroughly and carefully analyzed the meaning and context of the phrase "other arrangement" as it relates to transfers of property by a recipient. The Court concluded

> We cannot agree that the "other arrangement" language in the 1993 amendment is ambiguous in the sense applied in *Wirtz*. The plain meaning of "other arrangement," read in the context of section 1396p(b)(4), is arrangements other than those expressly listed that also convey assets at the time of the Medicaid recipient's death.

(Pet. App. at 34a).

The Court continued that "To read 'other arrangement' to include a lifetime transfer would be to read the words 'at the time of death' out of the statute." (Pet. App. at 36a).

Finally, the Minnesota Court concluded, "In light of the plain statutory language in its context, the conclusion of the *Wirtz* Court that 'other arrangement' is sufficiently ambiguous to include *lifetime transfers is unreasonable*." (emphasis supplied) (*Id.*). Given this

very careful analysis of the statute by the Minnesota Supreme Court and the rather cursory analysis by the North Dakota Court, there is no serious conflict between these Courts.

III. *Federal Law Does Not Make Spouses Jointly Liable for Reimbursement of Medical Assistance Received by Only One Spouse*

After the Minnesota Supreme Court found that the Minnesota recovery statute is partially preempted by federal law and that the definition of estate with respect to a deceased individual recipient under federal law does not include completed transfers made by the recipient during the recipient's lifetime, the Court specifically examined whether Dolores Barg had any interest of value in her spouse's property *at the time of her death.* The Court concluded she did not.

Petitioner alleges to this Court that the Minnesota Supreme Court misconstrued the assets of the deceased individual from which recovery may be made. Petitioner argues 42 U.S.C. § 1396p(e)(1) defines the recipient's assets as all income and resources of the individual and of the individual's spouse, and further argues the Court erred in not reading that definition into § 1396p(b)(4)(B) where the federal statute allows recovery "against other assets in which the individual had any legal title or interest *at the time of death.*" (emphasis supplied).

Since 1987 when Minnesota adopted the statutory provision allowing recovery against the assets of the deceased recipient and those of the surviving spouse's estate, the State of Minnesota has sought to impose

joint and several liability on the recipient and the recipient's spouse *under Minnesota law* for reimbursement of correctly paid medical assistance benefits. The Minnesota Court addressed this issue in its Opinion and concluded that "When determining the eligibility of a married person to receive Medicaid, states consider assets of both husband and wife as available to the spouse requesting benefits." (Pet. App. at 8a). But, the Court then explained there are provisions in place to protect the community spouse and many assets are not included in determining whether an individual is eligible to receive medical assistance. Among those protected assets are the homestead of the parties and the allowance of income and assets designated for the community spouse's needs. These protected assets are not available to pay for the recipient spouse's medical care. (Pet. App. at 9a). The Minnesota Court distinguished the federal statutes which govern eligibility for benefits from those which govern recovery of benefits. The Court rejected the contention of Petitioner that the term "assets" in § 1396p(b)(4)(B) is not restricted by the plain language in § 1396p(b)(4)(B). As part of that analysis the Court determined that decedent's transfers by "other arrangement" included only assets conveyed to a survivor *at the time of the recipient's death*. Any other interpretation, the Court said, would read the words "at the time of recipient's death" out of the statute. The Minnesota Court throughout this Opinion emphasized it resolved these matters by examining the plain language of the federal statute and finding *Minnesota law* was in conflict.

IV. *The Minnesota Supreme Court Applied Minnesota Law to Determine That Recipient Dolores Barg Had No Interest of Value in Any Asset of Her Spouse at the Time of Her Death*

The Minnesota Supreme Court's Opinion in this case turns on the Court's interpretation of property rights between spouses *under Minnesota law*. In Section IV, the Court addressed whether deceased recipient Dolores Barg "had any interest in property at the time of her death that would allow the County to make a claim against the estate of her surviving spouse, despite her transfer of her joint interest in the property prior to her death." (Pet. App. at 37a). The Court concluded she did not, because her interest in the property was "effectively and legally transferred before her death." (Pet. App. at 38a). The Court even looked at whether Dolores "had any other interest in the property at the time of her death that may be considered part of an expanded estate for recovery purposes under Minnesota law." (*Id.*). The Court found no marital interest *under Minnesota law*, and no other interest of any kind.

Then, applying both real property law principles and probate law principles *under Minnesota law*, the Court found that "Any interest recognized must be consistent with the underlying foundational rationale that recovery from a surviving spouse's estate is allowed only because of its relationship to the recipient's estate, from which federal law expressly allows recovery." (Pet. App. at 39a). The Court directly rejected the County's argument that the Minnesota medical assistance recovery statute,

Minn. Stat. § 256B.15, Subd. 2, provided to the contrary, stating

> The County argues that the reference to marital property in subdivision 2 reflects the Minnesota legislature's intent to make all marital property subject to spousal estate recovery. But subdivision 2 makes no reference to an interest at the time of death or to re-defining the probate estate to include all marital property, even property transferred prior to death. This is not surprising because subdivision 2 was enacted long before the optional estate definition authority was added to federal law.

(Pet. App. at 40a).

The Minnesota Supreme Court also recognized that the District Court, pursuant to *Gullberg*, found Dolores Barg had retained some interest even after her lifetime transfer of her interest in her homestead to her spouse because she was married to that spouse at the time of her death. However, the Supreme Court disagreed: "Whatever that interest, it dissipated at Dolores' death, rather than resulting in transfer of an interest of value to Francis." (*Id.*). This was a direct reference to Dolores' unvested, inchoate probate interest as a surviving spouse *under Minnesota law*. But here, Dolores *predeceased her spouse and therefore had no such interest*, the Court determined. The Court also noted that even Minnesota's 2003 expanded definition of estate for Medicaid recovery purposes which includes assets owned by the recipient in a joint tenancy or life estate *at the time of death* does not apply in this case,

because Dolores had made a *lifetime transfer* of her joint tenancy interest in the homestead. Also, the Minnesota legislature, the Court cautioned, made the provisions continuing life estates and joint tenancies "effective only for life estate and joint tenancy interests created on or after August 1, 2003." (Pet. App. at 41a). The stipulated facts in this case show Dolores Barg conveyed her joint tenancy interest in 2002.

Based on this very careful examination of *Minnesota law*, the Court wrote, "We hold Dolores Barg had no interest in property at the time of her death that can form the basis for recovery against the estate of Francis Barg." (Pet. App. at 43a).

V. *Courts of Other Jurisdictions Agree with the Minnesota Supreme Court Decision*

The Minnesota Supreme Court decision clearly aligns with the Courts that have thoroughly and carefully reviewed the plain meaning of the federal statute. The Minnesota Court cited the decisions of the Illinois Supreme Court in *Hines v. Department of Public Aid*, 850 N.E.2d 148 (Ill. 2006) and the Wisconsin Court of Appeals in *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995) as support for the proposition that the federal recovery statute restricts recovery from the estate of a surviving spouse. The Minnesota Court specifically pointed to the language from *Hines* that "No provision is made for the collection from the estate of the recipient's spouse." (*Hines* at 153). The *Hines* Court extended its analysis even further when it explained that initially the community spouse is allowed to retain assets and income that do not have to be spent

for the care of the recipient spouse. The *Hines* Court said the rationale for the federal statute not allowing claims against the estate of the surviving spouse is that, "The Medicaid Act affords *an additional element of financial protection* to the families of Medicaid recipients by *limiting the circumstances* in which a state may seek reimbursement for the payments it made on the recipient's behalf." (emphasis supplied) (*Hines* at 152). The *Hines* Court also characterized the language of the federal statute as "*clear and unambiguous*" and because of that "*the Court must enforce it as written.*" (emphasis supplied) (*Hines* at 153).

The Minnesota decision also noted that the *Budney* Court explained that the federal statute never "counter[ed] the initial blanket prohibition on recovery by authorizing recovery from the surviving spouse's estate." (Pet. App. at 21a).

The Tennessee Court of Appeals in *In re Estate of Smith*, 2006 WL 3114250 (Tenn. Ct. App. 2006) noted that, similar to the stipulated facts in *Barg*, Mrs. Smith transferred certain property to her husband before she died and "Counsel for the parties informed the Court that this transfer to the husband was contemplated, if not required, by Medicaid. *See* 42 U.S.C. § 1396r-5(f)." (*Smith* at 2, footnote 1). The Court quoted the language of that statute in part: "An institutionalized spouse may . . . transfer an amount equal to the community spouse resource allowance. . . . This transfer . . . should be made as soon as practical after the date of the initial determination of eligibility. . . ." (*Id.*). The Tennessee Court cited both the *Hines* and the *Budney* decisions with approval. Again, the Tennessee Court, referring

to the *Wirtz* conclusion to the contrary, indicated it "must respectfully disagree with the rationale of *Wirtz*" because under the federal statute to be recoverable "an asset must be one in which the recipient had a 'legal title or interest at the time of death'." (*Smith* at 5).

VI. *The Minnesota Supreme Court's Refusal to Defer to Approval of Minnesota's State Medicaid Plan by the Centers for Medicare and Medicaid Services Is Not a Compelling Reason to Approve This Petition*

The Minnesota Commissioner of Human Services argued that approval of Minnesota's estate recovery statute in 2007, as part of federal administrative approval of recent amendments of Minnesota's Medical Assistance State Plan, required deference to the administrative interpretation of the applicable federal statute. Although the Minnesota Commissioner of Human Services as *amicus curiae* submitted a copy of such approval to the Minnesota Supreme Court as supplemental authority July 9, 2007, the Court did not make this submission part of the record.

Instead, the Minnesota Court, initiated the discussion of federal preemption of a state statute with the statement that "Whether federal law preempts state law is primarily an issue of *statutory interpretation*, which we review de novo." (emphasis supplied) (Pet. App. at 18a). This approach is supported by the Court's citation with approval to *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002). In *Martin* the Minnesota Supreme Court discussed the deference due federal agencies under *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984) when the Court is engaged in statutory interpretation. Among other things the Court determined that "When an agency statement does not reflect formal rules or agency adjudications, yet attempts to address an ambiguity in the law, deference to the agency under *Chevron* is not appropriate." (Martin at 24). The Court in *Martin* also concluded that "Deference to agency interpretation is called for . . . only when there is an ambiguity in the expression of Congressional intent." (*Id.*).

Then, in its examination of the 1993 amendments to the federal recovery statute, which expanded recovery provisions, the Minnesota Court concluded, "The language of the federal law clearly limits that expansion to assets in which the recipient had an interest at the time of her death." (Pet. App. at 37a). Throughout its Opinion, the Minnesota Supreme Court described the statutory language as "plain statutory language." (Pet. App. at 36a). Therefore, the Court found no ambiguity and no need to defer to any agency to perform the Court's function of statutory interpretation.

VII. *The Petitioner Ignores the Plain Language of the Federal Statute in Favor of Broad Public Policy Arguments*

The United States Supreme Court's Rule 10 allows a writ to be granted for "compelling reasons." Petitioner alleges the Minnesota Supreme Court misconstrued federal law despite its rigorous and well-explained examination of federal statutes and a unanimous

decision of the Court. Petitioner minimizes and often ignores the plain language of the federal statute in explaining why the Court erred. Instead, Petitioner argues public policies not adopted by Congress instead of the plain language of 42 U.S.C. § 1396p(b).

In its Petition for Rehearing to the Minnesota Supreme Court, Petitioner alleged for the first time that Minnesota Medicaid benefit recoveries would be reduced by a dollar amount which is not a part of the record of the case. In its petition to this Court, the County alleges an even larger amount of loss. These unsubstantiated numbers are offered in support of Petitioner's argument that public policy, rather than the plain language of the federal statute, must control. These allegations are not facts in evidence and are not relevant to this Court's decision whether to grant certiorari.

The Minnesota Supreme Court instead relied on the rule of law, as expressed in the plain language of the federal statute, which is the expression of the public policy of the United States Congress. (Pet. App. at 23a).

VIII. *Petitioner Relies on Misstatements and Innuendo as a Substitute for Compelling Reasons to Grant Its Petition for This Court's Review.*

From the first page of its Petition for Writ of Certiorari to this Court, Petitioner bases its presentation to the Court on misstatement and innuendo.

A. On page 1 of its Petition to this Court Petitioner phrases the question presented as follows:

> Does 42 U.S.C. § 1396p(b)(4)(B) preempt a state law that requires recovery of Medicaid benefits from the value of assets in a surviving spouse's probate estate regardless of which spouse *formally* owned those assets when the recipient spouse died (emphasis supplied).

Use of the word "formally" diverts attention from the plain language of the federal statute, which allows recovery against "assets in which the individual had any legal title or interest at the time of death (to the extent of such interest) . . ." (42 U.S.C. § 1396p(b)(4)(B)). Implying that ownership of marital assets between spouses is a mere formality, and implying that formal ownership of assets between spouses should be without consequence, is a calculated misdirection by Petitioner.

Neither the federal statute nor the Minnesota Supreme Court's decision in this case discussed "formal" ownership of spousal assets. The federal statute at § 1396p(b)(4)(A) defines estate of the deceased recipient to include "all real and personal property and other assets included within the individual's estate as defined for purposes of state probate law" and in § 1396p(b)(4)(B) allows the state to include additional assets "in which the individual had *any legal title or interest at the time of death* . . ." The Minnesota Supreme Court in setting out the issues presented before it raised questions concerning recovery regarding "assets in which the recipient *had*

an interest at the time of her death." (Pet. App. at 17a). The Minnesota Court held that the Minnesota recovery statute is "preempted to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have *a legal interest at the time of death*, and to the extent that it permits recovery *beyond the extent of the recipient's interest.*" (emphasis applied) (Pet. App. at 43a). Dolores and Francis Barg initially held their homestead as joint tenants. The conveyance by deed of Dolores Barg's interest to Francis Barg transferred her "legal title and interest" to Francis Barg, not a mere "formal ownership," as Petitioner characterizes it on page 6 of the Petition. Real estate law in Minnesota has no interest called "formal ownership." When individuals take title to real estate by deed and convey title to individuals by deed they are changing ownership, and those changes have important consequences for the legal rights and interests of the parties.

B. In the STATEMENT Petitioner characterized recipient Dolores Barg's lifetime transfer of her one-half interest as a joint tenant in the couple's homestead to her community spouse — which is stipulated by the parties in this case as *allowable* under Minnesota law *and not fraudulent* — as "sheltering assets." (Pet. Br. at 6). Use of the term "sheltering assets" implies that something nefarious is occurring when assets are transferred to a community spouse in accordance with the federal Medical Assistance statutes. When federal statutes allow assets to be protected for a recipient of medical assistance or the recipient's family, there is nothing improper about using the protection provided by federal law.

C. Petitioner in the STATEMENT characterizes the inability of the State of Minnesota to recover all the assets in the non-recipient surviving spouse's estate as a "windfall" to the couple's heirs even though the Minnesota Supreme Court determined otherwise. Petitioner uses this term in a manner designed to disparage Francis and Dolores Barg and their heirs, and to take the focus off the Minnesota Court's determination that the plain language of the federal law does not allow recovery in these circumstances. (Pet. Br. at 6).

D. In the section "Medicaid Estate Recovery and Its Important Purposes" Petitioner claims Medicaid estate recovery serves to "recycle public funds" for other persons through recovery, even though the facts of this case contain no evidence to support the conclusion that recovered funds are part of a fund used for that purpose. Petitioner explained in its brief to the Minnesota Supreme Court that any recovered funds go to the state's general fund, not a dedicated Medicaid fund. (Pet. Br. at 52). The Minnesota legislature decides each year how much of the general fund to appropriate for Medicaid spending during the next budget cycle. The Courts of Illinois, Tennessee and Wisconsin, cited above, all denied recovery against the estates of surviving spouses without regard to the fiscal impact on the State's medical assistance program. The Medicaid program is not a revolving loan fund.

E. In the section "District Court and Court of Appeals Holdings" Petitioner alleges that "Both the District Court and the Court of Appeals held

that recovery on the County's claim was allowed." (Pet. Br. at 14). In fact, these Courts only *partially* allowed the claim based on the earlier Court of Appeals decision in *Gullberg* that a deceased recipient retains an interest after death that can support recovery against assets in the surviving spouse's estate.

F. Petitioner refers to the actual conveyance by deed of the recipient during lifetime as "simply changing the name on the asset before the recipient dies," ignoring the real consequences of terminating ownership by deed, namely that the recipient no longer had any *legal title or interest* in the property. (Pet. Br. at 20). The Minnesota Supreme Court noted that the Minnesota Court of Appeals in *Barg* "looked to standard real property law and *Gullberg* in deciding that Dolores retained a joint tenancy interest" after conveying her interest in the homestead to her spouse during her lifetime. The Supreme Court said plainly and simply, "We do not agree." (Pet. App. at 37A).

G. Petitioner claims in Section III that the Minnesota Supreme Court's decision allows the couple's home "to escape recovery" (Pet. Br. at 29). An asset does not "escape" recovery if the federal statute does not allow recovery against the asset. Again, Petitioner uses this characterization to express its disagreement with the plain language of the federal statute, rather than to accept it.

H. Also in Section III, Petitioner complains that elder law practitioners "defeat estate recovery by capitalizing on the exempt transfers under the

Medicaid rules." (Pet. Br. at 29). Petitioner ignores the fact that the transfers from spouse to spouse are never penalized at any time under federal statute 42 U.S.C. § 1396p(c)(2). Advice by practitioners is no different than advice from tax accountants and tax attorneys regarding lawful financial practices that might reduce a client's tax burden.

These are all examples of Petitioner using repetitive, value-loaded language to divert attention from the plain language of the federal statutes and the public policy decisions of the Congress. Petitioner's disagreement with the plain language of the law and the public policy of the Congress is not a "compelling reason" for the Court to grant this petition.

CONCLUSION

Petitioner has not established any compelling reasons for the Court to grant this Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

THOMAS J. MEINZ
107 Sixth Avenue South
Princeton, MN 55371
(763) 389-1243

Counsel for Respondent

130

No. 08-603

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

SUPPLEMENTAL BRIEF OF PETITIONER

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
A.	The Decision Below Is In Direct Conflict With North Dakota On The Same Federal Question	1
B.	The United States' Construction Gives No Effect To The Statutory Definition Of "Assets."	3
C.	Medicaid's Purpose Is For Assets To Be Used For A Couple's Care And Support Before Going To Heirs	5
D.	The United States' Recent Change In Position Causes More Uncertainty	9
E.	The United States' Changing Interpretation Demonstrates That The Statute Is, At Minimum, Ambiguous	11
F.	This Court's Review Is Necessary And Warranted	12
Conclusion		14

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931 (9th Cir. 2005) 11

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 12

Burgess v. United States, ___ U.S. ___, 128 S.Ct. 1572 (2008) 3

In re Estate of Wirtz, 607 N.W.2d 882 (N.D. 2000) 1, 2, 3

Lawson v. Suwannee Fruit & S.S. Co., 336 U.S. 198 (1949) 4

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004) 10

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 11

South Dakota v. Dole, 483 U.S. 203 (1987) 12

Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002) 4

STATUTES

42 U.S.C. § 1396p(a)(1) 6

42 U.S.C. § 1396p(a)(2) 6

42 U.S.C. § 1396p(b)(2) 9

42 U.S.C. § 1396p(b)(3) 9

42 U.S.C. § 1396p(c)(1)(A) 8

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396p(e)(1) 4, 6

42 U.S.C. § 1396p(e)(5) 4, 6

42 U.S.C. § 1396r-5(c)(4) 7

42 U.S.C. § 1396r-5(f)(1) 7

OTHER AUTHORITIES

2009 Minnesota Session Laws, Ch. 79 § 42 13

42 C.F.R. § 430.10-.25 10

42 C.F.R. § 433.36(h) 12

Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. For Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008) 10, 11

State Medicaid Manual, § 3810 12

U.S. Dep't of Health & Human Servs., *Issues In Medicaid Estate Recoveries: A Report to the United States Congress* (1989) 8

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari should be granted to resolve the direct conflict between the decision below and the North Dakota Supreme Court as well as to resolve the uncertainty for states that results from the United States' recent and abrupt change in position. The law, as construed by the court below and the United States, creates a gaping loophole in the Medicaid Act allowing and encouraging the sheltering of assets for the benefit of private heirs instead of being available to decrease public spending.

A. The Decision Below Is In Direct Conflict With North Dakota On The Same Federal Question.

As demonstrated in the Petition, the Minnesota Supreme Court's decision directly conflicts with the North Dakota Supreme Court's decision in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The United States' claim that any conflict is only about state law misreads the North Dakota court's opinion.

1. The United States' reasoning relies on a passing statement in *Wirtz* that is not the holding. U.S. Br. 13-14. The North Dakota court clearly identified its holding by stating that "[w]e *hold* [that] any assets *conveyed* by Clarence Wirtz to Verna Wirtz *before Clarence Wirtz's death* . . . are subject to the department's recovery claim." 607 N.W.2d at 886 ¶14

(emphasis added). Nothing in that court's discussion suggests, as the United States claims, that the recipient spouse had a state-law interest at the time of death. Indeed, the court explicitly states that federal law allows recovery from an asset in which the recipient "*once* held an interest." *Id.* (emphasis added). That interpretation of federal law is the exact opposite of the decision below. *Compare id. with* Pet. 37a ("To be recoverable, the asset must have been subject to an interest of the Medicaid recipient at the time of her death.").

2. The United States asserts that the North Dakota court "appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, *retained* an interest in the relevant property until his death, when the interest was conveyed to his spouse through 'other arrangement.'" U.S. Br. 14 (emphasis added). That assertion is unsupported by the *Wirtz* decision. The court specifically *rejected* the state's arguments contending that the recipient had *retained* various equitable interests that were present at his time of death. 607 N.W.2d at 883 ¶4 (stating "[w]e disagree with both parties' arguments").

Instead, the court reasoned that if the recipient had *once* had an ownership interest but had transferred that interest during his lifetime, then the transfer was an "other arrangement." It reasoned that "other arrangement" must be interpreted broadly to include lifetime transfers because Congress intended "to allow states a wide latitude in

seeking Medicaid benefit recoveries." *Id.* at 885-86 ¶13.

3. The United States suggests that, assuming there is a conflict, the North Dakota court might consider its new interpretation. U.S. Br. 15. However, it has not issued formal guidance and does not state that it intends to. *See* U.S. Br. 12. In addition, it is highly unlikely that North Dakota will disturb a nine-year old precedent. Speculation that differences will thus be "work[ed] . . . out" is unwarranted.

B. The United States' Construction Gives No Effect To The Statutory Definition Of "Assets."

In this case, and many others, the couple's single largest asset, their home, was sheltered from recovery through the recipient spouse's simple lifetime transfer of her formal interest. Such a transfer is not penalized only because it is between spouses. That loophole is well-known and often exploited. *See* Pet. 29-30. Although Congress chose not to require states to counteract that loophole, it did not prohibit states like Minnesota from choosing to doing so.

1. Explicit statutory definitions control the interpretation and application of statutory terms. *Burgess v. United States*, __ U.S. ___, 128 S.Ct. 1572, 1577 (2008). The unusual case where a definitional statute need not be followed is where doing so produces a "manifest incongruity" that will "destroy one of the major purposes" of the particular provision

containing the defined term. *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). Here, applying Congress's declared scope of the term "assets" as allowing states to reach those assets of the individual and of the individual's spouse does not result in manifest incongruity or destroy a purpose of the statute.

The statutory definition of "assets" contains three dimensions. 42 U.S.C. § 1396p(e)(1) (2006). First, "assets" identifies the nuts and bolts of the term as "all income and resources," of which only resources is relevant during post-death benefit recovery. "Resources" is further defined to include a couple's home. 42 U.S.C. § 1396p(e)(5). Second, "assets" identifies whose resources Congress intended to reach: those "of the individual and of the individual's spouse." The scope thus given to the term recognizes what this Court has also recognized: that "spouses typically possess assets and income jointly and bear financial responsibility for each other." *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002). Third, the "assets" definition declares that the term even encompasses a resource to which the individual or her spouse is entitled but does not receive because they have taken an action to make the resource technically unavailable. 42 U.S.C. § 1396p(e)(1)(A)-(C).

2. In this case, Petitioner's construction is consistent with and gives effect to all three dimensions. Francis Barg's probate estate contained the couple's resources, specifically their home. Although the home and other resources were in his name alone, they

were undisputedly marital property and even formerly jointly owned with Dolores Barg. Finally, Dolores Barg's lifetime transfer was an action that divested her interest to which she was otherwise entitled and thus was an action to make that resource technically unavailable to pay for her cost-of-care after her death. In contrast, the construction of the United States and the court below give no effect to the statutory definition and thus allow the lifetime transfer to forever exclude resources from later recovery.

The United States erroneously contends that applying the definitional statute makes the statute say "the opposite of what it says." U.S. Br. 10. Because Congress used the definitional statute to include a spouse's resources and to reach a resource the individual acted to make technically unavailable, Congress intended to allow states to pierce the veil of paper ownership arrangements. This allowance ensures, after both spouses have died, that states can choose to impose liability on an asset that would have been titled in the recipient spouse's name at her death except for a lifetime transfer designed only to shelter that asset from recovery.

C. Medicaid's Purpose Is For Assets To Be Used For A Couple's Care And Support Before Going To Heirs.

1. The United States claims that three other Medicaid provisions illustrate that the Act "imposes

significant limitations" on the principle that "spouses are expected to support each other." U.S. Br. 11. However, those provisions all illustrate Petitioner's contention that during a couple's lifetime, Medicaid requires them to use their assets for only one of two purposes: to care for the sick spouse or to support the community spouse. Those purposes are served by Petitioner's construction which is consistent with the Medicaid Act. Pet. 27 n.7. The purpose served by the United States' construction is only to subsidize inheritances at public expense.

The first provision is the exemption of a couple's home from eligibility calculations. That exemption is only effective when the community spouse *continues* to reside in the home. 42 U.S.C. § 1396p(a)(1)(B) and (2)(A) (2006). Once the individual is not reasonably expected to be able to return to the home and the spouse ceases residing in the home, a lien may be imposed to recover the benefits upon the sale or transfer of the home. *Id.* Moreover, Congress specifically made the exemption of the home inapplicable in the case of an institutionalized individual for purposes of the definition of "assets" in section 1396p. 42 U.S.C. § 1396p(e)(1) (defining "assets" as including the resources of both spouses), and § 1396p(e)(5) (defining "resources" as having the meaning in section 1382b but "without regard (in the case of an institutionalized individual) to the exclusion [of the home]" in that section).

The second provision is the ability of the community spouse to retain some resources after their

spouse is eligible for Medicaid. U.S. Br. 11. That provision is also limited to supporting the community spouse during his lifetime, not to also benefitting the couple's heirs. 42 U.S.C. § 1396r-5(f)(1) (allowing transfer of resources "only to the extent the resources are transferred to (or for the sole benefit of) the community spouse.").

The third provision states that "[d]uring the continuous period in which an institutionalized spouse is in an institution" and after the institutionalized spouse is eligible for Medicaid benefits, "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(c)(4). Again, the provision is limited to the spouse's lifetime for the specific purpose of providing support.

The eligibility provisions and their limitations fit the eligibility context when the spouses are alive, but are irrelevant in the recovery context when the spouses are dead. They were never intended to allow a couple's assets to be permanently unavailable. That is precisely what the Government reported to Congress shortly after their enactment. Its report stated that

> Federal rules permitting certain transfers of assets (e.g., transfer of the home to the spouse as authorized in MCCA) convey the clear impression that the purpose is not to place the asset permanently beyond reach of government claim but to ensure that the spouse, dependent child, and other specified persons can have use of the asset until the

> grounds for that use end (e.g., death or attainment of legal majority).

U.S. Dep't of Health & Human Servs., *Issues In Medicaid Estate Recoveries: A Report to the United States Congress* 13 (1989).

2. The United States completely ignores the asset-transfer provisions of section 1396p(c) which are the most relevant and critical to understanding Medicaid's treatment of spousal assets. Those provisions are designed to keep whatever assets a couple has from being used for anything other than care for the sick spouse and support for the community spouse. Even with the limitations noted by the United States, a community spouse is never able to freely transfer assets without a penalty being imposed on his spouse's eligibility or his own possible future eligibility. 42 U.S.C. § 1396p(c)(1)(A).

Congress created a closed system encompassing both spouses and their assets in which ownership is simply irrelevant as long as the assets stay with the spouses. The United States' construction of section 1396p(b)(4)(B) would create a glaring exception to Congress's design, and would prohibit states from recovering public expenditures from spousal assets only because the couple removed the recipient spouse's name from the asset. The Minnesota Supreme Court's holding and the United States' position are thus contrary Medicaid objectives, inconsistent with the overall Medicaid statutory scheme, and unsound

public policy. The only beneficiaries are a couple's heirs.

3. This protection of a couple's heirs is in sharp contrast to Congress's limitation of any protection of heirs to only two specific circumstances. Section 1396p(b)(2) requires delayed recovery when there is a surviving spouse, or dependent or disabled child. Section 1396p(b)(3) requires that states provide for waiver of recovery if recovery "would work an undue hardship on heirs." Thus, Congress did not intend to prohibit recovery to benefit a couple's heirs except for in those two very narrow circumstances.

D. The United States' Recent Change In Position Causes More Uncertainty.

Whereas the United States approved Minnesota's state plan provision that all spousal assets are subject to recovery regardless of ownership, it now changes its position to require that the recipient spouse owned the asset at death. *Compare* Pet. 93a *with* [U.S. Br. 12 – left over from striking the original first sentence]. U.S. Br. 12. This sudden change in position weighs in favor of granting the Petition because that change increases uncertainty for the states. Those states with existing approved state plans will be uncertain of their status. Those contemplating state plan amendments or legislation will be unsure of whether to proceed. States will wonder whether the United States will again change its position.

The United States' approval of Minnesota's state plan remains effective as there is no mechanism for it to "unapprove" a state plan based on a changed interpretation. *See* 42 C.F.R. § 430.10-.25 (2008). The already-approved state plans of North Dakota, Oregon, Indiana, and Idaho all contain similar provisions and also remain effective. Pet. 23 nn.4-5.

The United States appears to claim that its approval of Minnesota's state plan amendment was meaningless. U.S. Br. 12. It asserts that its "approval is not the equivalent of binding interpretive guidance." *Id.* The only authority it offers for that proposition is the regulation providing that a state plan amendment is deemed approved if not acted upon after ninety days. *Id.* Approval in this case, however, was an affirmative and deliberate approval, not an approval based upon inaction. Pet. 90a.

The United States' present disavowal of the importance of its own state plan approval process is the *opposite* of its position when defending its state plan disapprovals before the U.S. Court of Appeals. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *16, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. For Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008) (contending that "the administrative process through which state plan amendments are considered . . . counsels deference."); *accord S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 (5th Cir. 2004) (concluding that CMS's "review and determination definitively

indicate whether it interprets a state plan or amendment to be in conformity with the statute"; and holding that "CMS's approval of state plans affording coverage for [particular medical care or service] demonstrates that the agency construes [the Medicaid statute] as encompassing that type of medical care or service.").

The United States asserts that it has not promulgated rules or issued formal guidance interpreting the federal statute at issue. U.S. Br. 12. It thus argues that none of its prior acts constitute an interpretation. That contradicts its prior position and holdings from various U.S. Court of Appeals circuits. *E.g.*, Response Brief of Ctrs. for Medicare & Medicaid Servs., 2007 WL 2988090 at *41, in *Maryland Dep't of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424 (4th Cir. 2008); *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005).

E. The United States' Changing Interpretation Demonstrates That The Statute Is, At Minimum, Ambiguous.

The United States asserts that because the federal statute "leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death" the presumption against preemption and ambiguous conditions doctrine do not apply. U.S. Br. 11-12. Yet, its own changing position is evidence that

the Medicaid statute *is* ambiguous. *Cf. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (stating the existence of opposing interpretations by different courts makes it difficult to contend that a particular statute is unambiguous). The United States' current position stands in stark contrast to its estate recovery regulations, 42 C.F.R. § 433.36(h), the State Medicaid Manual, § 3810, and the state plan templates it requires states to use in agreeing to the express conditions accompanying receipt of Medicaid funds.

Any conditions on federal funds must be unambiguous. *South Dakota v. Dole*, 483 U.S. 203, 207. When the federal statute does not give "clear notice" to state officials that a particular condition is attached to federal funds, that condition is unenforceable. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Because a prohibition on recovery from all spousal assets remaining after the last spouse dies is not unambiguously provided, no such condition can be imposed on states when they accept Medicaid funds.

F. This Court's Review Is Necessary And Warranted.

In addition to needing to resolve the direct conflict between the court below and North Dakota, this Court should grant review to end the uncertainty in this area. States will likely be dissuaded by the decision below combined with the United States' changed interpretation from even attempting to expand their

estate recovery programs. Use of what the United States acknowledges is an important element of Medicaid may be stymied without this Court's review.[1]

Petitioner asks that this Court resolve the conflict and uncertainty by granting the petition.

---

[1] Petitioner notes that Minnesota recently passed legislation, effective July 1, relating to the decision below. The legislation provides, in relevant part, that

> [a]t the time of death of a recipient spouse and solely for purpose of recovery of medical assistance benefits received, a predeceased recipient spouse shall have a legal title or interest in the undivided whole of all of the property in which the recipient and the recipient's surviving spouse owned jointly or which was marital property at any time during their marriage regardless of the form of ownership and regardless of whether it was owned or titled in the names of one or both the recipient and the recipient's spouse.

2009 Session Laws, Ch. 79 § 42. The legislation will not, however, apply to the many cases that have been stayed or otherwise placed on hold in state courts as a result of this appeal. Those cases include recovery claims totaling millions of dollars. In addition, litigation challenging the legislation is expected and likely will rely on the decision below.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Minnesota should be granted.

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street,
Suite 900
St. Paul, Minnesota
55101-2127
(651) 296-8714

Counsel for Petitioner

REPLY BRIEF

117

(3)

No. 08-603

Supreme Court, U.S.
FILED
JAN 22 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-8714

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Court should grant a writ of certiorari. The Minnesota Supreme Court's decision conflicts with the U.S. Secretary of Health and Human Services' interpretation of federal law. The decision below is also in direct conflict with the holding of another state supreme court.

1. Minnesota's state Medicaid plan provides that any asset *held by either or both spouses* is subject to recovery. Pet. App. 93a. The Secretary's approval of this state plan provision reflects his determination that it is consistent with federal law.

Respondent does not dispute that the decision below is in irreconcilable conflict with the Secretary's interpretation. Nor does he dispute the significance of this conflict. The Secretary determines whether states are complying with the conditions tied to federal Medicaid funds. His interpretation of those conditions is not limited to Minnesota's state plan. He also approved similar spousal recovery provisions in four other state plans. In addition, the Secretary's interpretation will be applied if and when other states elect to include spousal recovery.

2. The Secretary's interpretation and the North Dakota Supreme Court's holding are both supported by the statute's plain language. Respondent's contention that the decision below is consistent with the plain language ignores the same important word that

the Minnesota Supreme Court completely ignored: "assets."

Section 1396p(b)(4)(B) provides that states may seek recovery from any other property and "assets" that may not be part of a state-defined probate estate. Indeed, states are expressly allowed to provide for recovery from "any other real and personal property *and other assets* in which the individual had any legal title or interest at the time of death." 42 U.S.C. § 1396p(b)(4)(B) (2000 & Supp. V 2005) (emphasis added). At the same time Congress enacted that provision, it declared that "assets," as used in section 1396p, "includes all income and resources of the individual *and of the individual's spouse*." 42 U.S.C. § 1396p(e)(1) (2000 & Supp. V 2005) (emphasis added); *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, § 13611(c) (adding definition of "assets") and § 13612(c) (adding the allowance for states to recover from "any . . . other assets"); 107 Stat. 312, 626, 628 (1993). Therefore, when Congress referred to "any . . . other assets," it intended to include those of a spouse in addition to those of the individual Medicaid recipient.

Respondent's claim that the court below rejected Petitioner's argument regarding "assets" is incorrect. Br. in Opp. 13. The Minnesota Supreme Court *never addressed* the role of the definitional statute, let alone rejected its implications. *See* Pet. App. 1a-45a.

3. Respondent incorrectly asserts that the decision below is supported by earlier decisions by the Illinois

Supreme Court and the Wisconsin Court of Appeals. Br. in Opp. 7, 16-18. Those courts, however, never reached the issue presented here about the scope of recovery. Rather, unlike the Minnesota Supreme Court, they held that federal law prohibits all spousal recovery claims. *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148, 153 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245, 246 (Wis. Ct. App. 1995). The Illinois and Wisconsin courts thus never considered what, if any, limitations federal law imposed on the scope of recovery.

4. Respondent wrongly suggests that the Court would need to address a state property law question if it granted certiorari. *See* Br. in Opp. 14. The issue raised by the petition regarding spousal recovery is purely a question of federal law; whether Medicaid law limits the scope of spousal recovery.

5. Finally, Respondent erroneously asserts that Petitioner required the recipient spouse in this case to transfer her interest in the home to the nonrecipient spouse. Br. in Opp. 6. Minnesota does not require such a transfer. *See* Minnesota Dep't of Human Services, Health Care Programs Manual, § 19.25.15.05 (instructing county personnel to exclude homestead property from Medicaid eligibility calculations if the long-term care resident's spouse continues to resides in the home) *available at* http://hcopub.dhs.state.mn.us/hcpmstd/19_25_15_05.htm (2008). Indeed, there

was no need for a transfer in this case other than to shelter the asset from future recovery.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

ROBIN C. VUE-BENSON
Assistant Attorney General
Counsel of Record

MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota Street,
Suite 900
St. Paul, Minnesota
55101-2127
(651) 296-8714

Counsel for Petitioner

AMICUS CURIAE BRIEF

No. 08-603

In the Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

LEONDRA R. KRUGER
Assistant to the Solicitor General

TEAL LUTHY MILLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID S. CADE
Acting General Counsel

JANICE L. HOFFMAN
Associate General Counsel

CAROL J. BENNETT
Deputy Associate General Counsel

LESLIE M. STAFFORD
BARBARA J. COLLINS
Attorneys
Department of Health and Human Services
Washington, D.C. 20201

QUESTION PRESENTED

The Medicaid program, 42 U.S.C. 1396 *et seq.*, generally forbids participating States from recovering correctly paid benefits. The statute requires, however, that a State seek to recover the cost of nursing home services paid on behalf of an individual over the age of 55 from the individual's probate estate, after both the individual and her surviving spouse have died. The statute also permits (but does not require) a State to recover from "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(4)(B).

The question presented is whether, under Section 1396p(b)(4)(B), a State that seeks to recover correctly paid benefits from the estate of the recipient's surviving spouse is limited to recovering the value of assets in which the recipient had a legal interest at the time of her death.

TABLE OF CONTENTS

Page

Statement 1
Discussion 8
A. The decision of the Minnesota Supreme Court is correct 8
B. The decision below does not warrant further review 12
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 12
Atkins v. *Rivera*, 477 U.S. 154 (1986) 2
California Fed. Sav. & Loan Ass'n v. *Guerra*, 479 U.S. 272 (1987) 9
Estate of Budney, In re, 541 N.W.2d 245 (Wis. Ct. App. 1995) 13
Estate of Gullberg, In re, 652 N.W.2d 709 (Minn. Ct. App. 2002) 6, 7, 12
Estate of Wirtz, In re, 607 N.W.2d 882 (N.D. 2000) 8, 13, 14
Harris v. *McRae*, 448 U.S. 297 (1980) 1
Hines v. *Department of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006) 13
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 11
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981) 2
Wisconsin Dep't of Health & Family Servs. v. *Blumer*, 534 U.S. 473 (2002) 3

Statutes and regulation: Page

Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612, 107 Stat. 627 4
Social Security Act, Tit. XIX, 42 U.S.C. 1396 *et seq.* 1
42 U.S.C. 1396 2
42 U.S.C. 1396a 2
42 U.S.C. 1396a(a)(10)(A)(i)(IV) 2
42 U.S.C. 1396a(a)(10)(A)(i)(VI) 2
42 U.S.C. 1396a(a)(10)(A)(i)(VII) 2
42 U.S.C. 1396a(a)(10)(C) 2
42 U.S.C. 1396a(a)(17) 2
42 U.S.C. 1396a(a)(18) 3
42 U.S.C. 1396b(a)(1) 2
42 U.S.C. 1396d(b) 2
42 U.S.C. 1396p 4
42 U.S.C. 1396p(b) 11, 13
42 U.S.C. 1396p(b)(1) 3, 9
42 U.S.C. 1396p(b)(1)(A) 4
42 U.S.C. 1396p(b)(1)(B) (1988) 3
42 U.S.C. 1396p(b)(1)(B) 4, 9
42 U.S.C. 1396p(b)(2) 4, 9
42 U.S.C. 1396p(b)(2)(A) 4, 7
42 U.S.C. 1396p(b)(2)(B) 6
42 U.S.C. 1396p(b)(3) 4
42 U.S.C. 1396p(b)(4)(A) 4, 9
42 U.S.C. 1396p(b)(4)(B) ..... *passim*
42 U.S.C. 1396p(c)(1)(A) 3
42 U.S.C. 1396p(c)(2) 3

Statutes and regulation—Continued: Page

42 U.S.C. 1396p(h)(1) 10
42 U.S.C. 1396r-5(c) 2
42 U.S.C. 1396r-5(c)(4) 3, 11
42 U.S.C. 1396r-5(c)(5) 3, 11
42 U.S.C. 1396r-5(d) 3, 11
42 U.S.C. 1396r-5(f)(2) 3, 11
42 U.S.C. 1382b(a)(1) 3, 11
Act of June 12, 1987, ch. 403, art. 2, § 82 (Minn. Stat. Ann. § 256B.15 (2007)) 5
§ 256B.15, subd. 2 ..... 5, 7, 9
42 C.F.R. 430.16(a)(1) 12

Miscellaneous:

66 Fed. Reg. 35,437 (2001) 2
Governor's Recommendation, Minnesota State Budget, 2010-11 Biennial Budget, Human Services Dep't (Jan. 27, 2009) 15
H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. (1993) ... 10
Office of Assistant Secretary for Policy & Evaluation, HHS, *Policy Br. No. 6, Medicaid Estate Recovery Options* (Sept. 2005) 15

In the Supreme Court of the United States

No. 08-603

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT, ET AL., PETITIONERS

v.

MICHAEL F. BARG

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Medicaid program, established in 1965 in Title XIX of the Social Security Act (Medicaid Act), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program under which the federal government provides funding to States to provide medical assistance to eligible needy persons. *Harris* v. *McRae*, 448 U.S. 297, 301 (1980).

To participate in the Medicaid program, a State must develop a plan specifying, among other things, the categories of individuals who will receive medical assistance

under the plan and the specific kinds of medical care and services that will be covered. 42 U.S.C. 1396a. State Medicaid plans are reviewed by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration) in the Department of Health and Human Services (HHS). 42 U.S.C. 1396; see 66 Fed. Reg. 35,437 (2001). If CMS approves a State's plan, the State is thereafter eligible for federal reimbursement for a specified percentage of the amounts "expended * * * as medical assistance under the State plan." 42 U.S.C. 1396b(a)(1), 1396d(b).

b. The Medicaid Act requires participating States to provide Medicaid benefits to the "categorically needy," that is, those persons eligible for financial assistance under specified federal programs. *Atkins* v. *Rivera*, 477 U.S. 154, 157 (1986); see 42 U.S.C. 1396a(a)(10)(A)(i)(IV), (VI) and (VII).

The Act also permits States to extend benefits to the "medically needy," that is, "persons lacking the ability to pay for medical expenses, but with incomes too large to qualify for categorical assistance." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 37 (1981); see 42 U.S.C. 1396a(a)(10)(C). To qualify as medically needy, a person may have income no higher than a defined threshold and may own assets of no more than a defined value. If the assets of a Medicaid applicant exceed the qualifying threshold, she must "spend down" her assets until they are at or below the qualifying threshold. See 42 U.S.C. 1396a(a)(17).

When a married person is institutionalized in a nursing home or other facility, the Medicaid Act considers the assets of both the institutionalized spouse and the non-institutionalized, or "community," spouse in determining the applicant's eligibility for benefits. 42 U.S.C.

1396r-5(c). To prevent the community spouse from being impoverished as a result of a required spend-down of assets, the statute exempts certain assets, such as the couple's home and an automobile, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain a certain level of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). See *Wisconsin Dep't of Health & Family Servs.* v. *Blumer*, 534 U.S. 473, 480 (2002) (anti-impoverishment provisions are intended to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance"). Furthermore, although the Medicaid Act generally forbids a Medicaid applicant or her spouse from transferring assets at below market value in order to become eligible for benefits, 42 U.S.C. 1396p(c)(1)(A), the statute expressly permits the applicant to transfer assets, including an interest in the homestead, to the community spouse, 42 U.S.C. 1396p(c)(2). Once the institutionalized spouse is determined to be eligible for benefits, the statute provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4).

c. As a general rule, the Medicaid Act forbids States from seeking recovery of Medicaid benefits that were correctly paid. 42 U.S.C. 1396p(b)(1); see also 42 U.S.C. 1396a(a)(18). The statute provides an exception, however, for recovery from the estates of certain institutionalized and older beneficiaries:

Before 1993, the Medicaid Act's recovery provision permitted, but did not require, States to recover benefits paid on behalf of certain individuals, from the individuals' estates. 42 U.S.C. 1396p(b)(1)(B) (1988). In 1993,

Congress amended Section 1396p to require States to recover correctly paid benefits in certain circumstances. Omnibus Reconciliation Act of 1993 (OBRA 1993), Pub. L. No. 103-66, § 13612, 107 Stat. 627. As amended, the Act's estate-recovery provision requires States to seek recovery in the case of an individual who was permanently institutionalized, 42 U.S.C. 1396p(b)(1)(A), and in the case of a person who received, at age 55 or thereafter, nursing facility services, home and community-based services, or related hospital and prescription drug services, 42 U.S.C. 1396p(b)(1)(B). In addition, a State has the option to seek recovery of the cost of other items or services paid on behalf of individuals over the age of 55. *Ibid.* The recovery "may be made only after the death of the individual's surviving spouse, if any," and only at a time when the individual has no surviving children under the age of 21 or children who are blind or disabled. 42 U.S.C. 1396p(b)(2) and (2)(A). Such recovery may be waived in cases where it "would work an undue hardship." 42 U.S.C. 1396p(b)(3).

The statute provides for recovery of the cost of benefits paid on behalf of an individual over the age of 55 from "the individual's estate." 42 U.S.C. 1396p(b)(1)(B). The term "estate," for those purposes, "shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law." 42 U.S.C. 1396p(b)(4)(A). The statute further provides that an individual's "estate"

> may include, at the option of the State * * *, any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint ten-

> ancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

42 U.S.C. 1396p(b)(4)(B).

2. Since 1987, Minnesota law has provided for recovery of Medicaid benefits from the estate of a recipient's surviving spouse, as well as from the estate of a recipient. Act of June 12, 1987, ch. 403, art. 2, § 82 (Minn. Stat. Ann. § 256B.15 (2007)). Minnesota's estate-recovery law provides that "[a] claim against the estate of a surviving spouse who did not receive medical assistance, for medical assistance rendered for the predeceased spouse, is limited to the value of the assets of the estate that were marital property or jointly owned property at any time during the marriage." Minn. Stat. Ann. § 256B.15, subd. 2 (2007).

3. In 2004, petitioner filed a claim against the estate of Francis Barg, in which he sought recovery of Medicaid benefits paid on behalf of Mr. Barg's predeceased spouse, Dolores Barg. Pet. App. 4a.[1]

a. During their marriage, the Bargs purchased real property in Princeton, Minnesota, to which they took title as joint tenants. In 2001, Ms. Barg entered a nursing home, and shortly thereafter applied for, and received, long-term Medicaid benefits. Pet. App. 2a-3a. Ms. Barg subsequently transferred her joint tenancy interest in the homestead property to Mr. Barg. At the time of the transfer, the assessed value of the property was $120,800. Ms. Barg also terminated her ownership interest in certificates of deposit the couple had held jointly. *Id.* at 3a-4a.

---

[1] On March 2, 2009, this Court granted the State of Minnesota's conditional motion to intervene as a party aligned with petitioner Vos. All references in this brief to "petitioner" refer to petitioner Vos.

Ms. Barg died in 2004, having received a total of $108,413.53 in medical-assistance benefits through the state Medicaid program. Mr. Barg died five months later. Pet. App. 4a.

b. In his claim against Mr. Barg's estate, petitioner sought to recover the full amount of Medicaid benefits paid on behalf of Ms. Barg. Pet. App. 4a. Respondent, who is the representative of Mr. Barg's estate, allowed $63,880 as a claim against the estate, but disallowed $44,533.53. *Ibid.*[2]

Petitioner filed a claim-allowance petition in state court. The district court upheld the partial disallowance. Pet. App. 46a-51a. The court relied on the Minnesota Court of Appeals' decision in *In re Estate of Gullberg*, 652 N.W.2d 709 (2002), which held that Minnesota's estate-recovery law is preempted insofar as it permits recovery up "to the value of the assets of the estate that were marital property" at any point in the marriage, because 42 U.S.C. 1396p(b)(2)(B) permits recovery only "to the extent of" the Medicaid recipient's interest at the time of death. *Gullberg*, 652 N.W.2d at 714. The court concluded that, at time of her death, Ms. Barg's interest in the assets of Mr. Barg's estate that were marital property, including a life-estate interest in the homestead and a personal property allowance, totaled $63,880. Pet. App. 50a-51a.

c. The Minnesota Court of Appeals reversed and remanded for recalculation of petitioner's allowable claim. Pet. App. 52a-64a. Like the district court, the

---

[2] Respondent's partial allowance of $63,880 apparently rested on the premise that Ms. Barg (1) had a one-half interest in the homestead, valued at $58,880, at the time of her death, despite the inter vivos transfer, and (2) was entitled to a personal property allowance in the amount of $5000. See Pet. App. 49a.

court of appeals concluded that, under federal law, the claim was necessarily limited to the value of Ms. Barg's interest in specified assets at the time of her death. *Id.* at 58a (citing *Gullberg*, 652 N.W.2d at 714). The court of appeals concluded, however, that Ms. Barg's interest in the homestead at the time of her death was a joint tenancy interest, valued as a one-half interest in the property's value of $120,800, or $60,400. *Id.* at 62a.

d. The Minnesota Supreme Court affirmed in part and reversed in part, concluding that petitioner was not entitled to full recovery from Mr. Barg's estate. Pet. App. 1a-45a.

As an initial matter, the court rejected respondent's contention that federal law completely preempts Minnesota's estate-recovery law insofar as it permits recovery from the estate of the Medicaid recipient's surviving spouse. Pet. App. 19a-30a. The court concluded that allowing recovery from a surviving spouse's estate is consistent with both the Act's preclusion of recovery from the Medicaid recipient's estate until after the death of a surviving spouse, 42 U.S.C. 1396p(b)(2)(A), as well as the purposes of the Medicaid Act's recovery provisions. Pet. App. 29a.

The court concluded, however, that federal law limits the scope of recovery against a surviving spouse's estate to the value of assets in which the recipient spouse had an interest "at the time of death," 42 U.S.C. 1396p(b)(4)(B), and thereby preempts Minnesota's estate-recovery law insofar as it permits the State to reach any other assets "that were marital property or jointly owned property *at any time during the marriage*." Pet. App. 31a (quoting Minn. Stat. Ann. § 256B.15, subd. 2 (2007)); see *id.* at 30a-37a.

The court further concluded that Ms. Barg did not have any interest in the homestead or bank accounts at the time of her death, because she had transferred her interest in those assets to Mr. Barg before she died. The court therefore held that petitioner had no legal entitlement to satisfaction of the State's claim from those assets. Pet. App. 37a-43a. But because respondent had partially allowed petitioner's claim, and never challenged the district court's award of that partial allowance of $63,880, the Minnesota Supreme Court held that petitioner could recover that amount. *Id.* at 43a-45a.

DISCUSSION

The Minnesota Supreme Court's decision is correct and does not warrant further review. The federal Medicaid Act permits recovery of correctly paid benefits from the estate of the recipient's surviving spouse, but limits that recovery to the value of assets in which the recipient had a legal interest at the time of her death.

Although the result in this case differs from the result in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000), the difference may not reflect a disagreement about the meaning of federal Medicaid law, but only divergent conclusions about when, under state law, an individual retains a legal interest in assets conveyed to a spouse. The petition for a writ of certiorari should be denied.

A. The Decision Of The Minnesota Supreme Court Is Correct

1. The Minnesota Supreme Court correctly concluded that the Medicaid Act forbids petitioner from seeking to recover correctly paid benefits from assets in which the Medicaid recipient had no legal interest at the time of her death.

Under the Medicaid Act, a State generally may not seek to recover correctly paid Medicaid benefits. 42 U.S.C. 1396p(b)(1). The Act provides, however, that a State (1) *must* seek recovery of nursing home and related benefits paid on behalf of an individual over the age of 55 from "the individual's estate" as defined by state probate law; and (2) *may*, at its option, define "the individual's estate" more broadly to include any "assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. 1396p(b)(1)(B), (b)(4)(A) and (B). Thus, the Medicaid Act, which permits recovery only after the death of the recipient's surviving spouse, 42 U.S.C. 1396p(b)(2), authorizes a State to file a reimbursement claim against the surviving spouse's estate, up to the value of any assets in which the Medicaid recipient had a legal interest at the time of her death.

The Minnesota estate-recovery law exceeds the scope of that authorization. It permits the State to recover from a surviving spouse's estate "the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*," Minn. Stat. Ann. § 256B.15, subd. 2 (2007) (emphasis added), without regard to whether the recipient retained an interest in the assets at the time of her death. Because a State may not recover correctly paid Medicaid benefits except to the extent authorized by federal law, see 42 U.S.C. 1396p(b)(1), Minnesota's statute conflicts with federal law and is therefore preempted. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280-282 (1987).

2. Petitioner argues (Pet. 25-28) that the text of the Medicaid Act imposes no limit on permissible recovery from the estate of the Medicaid recipient's surviving spouse, because the Act defines the term "assets" to include "all income and resources of the individual and of the individual's spouse." 42 U.S.C. 1396p(h)(1). According to petitioner, "[b]y including resources of both 'the individual' and 'of the individual's spouse' in the meaning of 'assets,' Congress clearly intended that the spouse's resources fall within the scope of § 1396p(b)(4)(B)." Pet. 27.

Petitioner is incorrect. Although the general statutory definition of "assets" does encompass resources of both "the individual" (*i.e.*, the Medicaid recipient) and "the individual's spouse," the particular provision of the Medicaid Act at issue here refers specifically to any "assets in which *the individual* had any legal title or interest at the time of death." 42 U.S.C. 1396p(b)(4)(B) (emphasis added). Petitioner's argument finds it necessary to rewrite that clause to read "'any * * * assets in which [*either or both the individual and the individual's spouse*] had any legal title or interest.'" Pet. 26 (brackets and asteriks in original) (emphasis added). But this editing does nothing less than make the statute say the opposite of what it says. The plain language of the operative provision of the Act refutes petitioner's reading.[3]

---

[3] In describing the operation of the amended estate-recovery provision, the legislative history of the 1993 amendments also focused on the assets of the individual who had received Medicaid benefits, rather than the resources of both the individual and his or her spouse. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 835 (1993) ("At the option of the State, the estate against [which] * * * recovery is sought may include any real or personal property or other assets in which *the*

3. Petitioner's reading of the Medicaid Act also finds little support in the Act's other provisions concerning the treatment of spousal assets. See Pet. 27-28. As petitioner notes, the Medicaid Act generally considers the community spouse's assets for purposes of determining whether an institutionalized individual is eligible to receive benefits. But the Act also exempts certain property, such as the couple's home, from consideration, 42 U.S.C. 1382b(a)(1), 1396r-5(c)(5), and allows the community spouse to retain certain amounts of resources and income that are not considered available to pay for the applicant's medical care, 42 U.S.C. 1396r-5(d) and (f)(2). Moreover, once the institutionalized spouse is determined to be eligible for benefits, the Medicaid Act provides that "no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. 1396r-5(c)(4). The Medicaid Act, in short, imposes significant limitations on petitioner's asserted principle that "spouses are expected to support each other." Pet. 27. To read Section 1396p(b)(4)(B) in accordance with its plain terms thus is consistent with the broader statutory scheme.

4. Because Section 1396p(b) leaves no ambiguity about limiting spousal estate recovery to the value of assets in which the Medicaid recipient had a legal interest at the time of death, the presumption against preemption does not come into play, Pet. 28 (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996))—even assuming, arguendo, that this presumption has force in the context of a comprehensive federal-state cooperative program like Medicaid in which the State's program is sub-

---

beneficiary had any legal title or interest at the time of death, including the home.") (emphasis added).

ject to federal approval. And for similar reasons, petitioner's suggestion that the decision below improperly enforces against the State "[a]n ambiguous condition" on the acceptance of federal funds under Spending Clause legislation lacks any merit. Pet. 28 n.8 (citing *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006)).

Petitioner also errs (Pet. 20-23, 28 n.8) in asserting that the Minnesota Supreme Court's interpretation of Section 1396p(b)(4)(B) is inconsistent with the interpretation of the responsible federal agency. HHS has neither promulgated regulations nor issued guidance interpreting Section 1396p(b)(4)(B) to authorize the kind of estate recovery that petitioner urges in this case. To be sure, CMS in 2007 approved Minnesota's state plan amendment incorporating its statutory spousal recovery provisions. See Pet. App. 89a-93a. But CMS's approval is not the equivalent of binding interpretive guidance. Cf. 42 C.F.R. 430.16(a)(1) (a state plan or plan amendment is deemed approved if CMS does not act within 90 days after submission). Moreover, CMS's approval followed binding judicial decisions in Minnesota's own courts interpreting the Medicaid Act to limit recovery to assets in which the Medicaid recipient had an interest at time of death. See, *e.g.*, *In re Estate of Gullberg*, 652 N.W.2d 709, 714 (Minn. Ct. App. 2002). As set forth above in this brief, see p. 9, *supra*, HHS also interprets the Medicaid Act to limit recovery in that manner.

B. The Decision Below Does Not Warrant Further Review

1. Petitioner contends (Pet. 24-25) that review is warranted to resolve a conflict between the decision below and the North Dakota Supreme Court's decision in

Wirtz, *supra*.[4] In *Wirtz*, much as in this case, a Medicaid recipient had transferred assets to his spouse before his death, and the State sought to recover the cost of the Medicaid benefits from the spouse's estate after her death. The court held that the State was permitted under 42 U.S.C. 1396p(b)(4)(B) to recover the value of any assets "in which the deceased recipient once held an interest," including assets conveyed to his spouse before his death. *Wirtz*, 607 N.W.2d at 886.

But the different results in this case and in *Wirtz* may not reflect a disagreement about the meaning of federal Medicaid law. Notably, the North Dakota Supreme Court, like the Minnesota Supreme Court, stated that the State "[could] assert a claim against real or personal

---

[4] As the Minnesota Supreme Court noted (Pet. App. 21a-22a), two other state courts have concluded that Section 1396p(b) authorizes recovery only from the estate of a Medicaid recipient, and not from the estate of his or her spouse. See *Hines* v. *Department of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006); *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995). But those decisions and the decision below are not in conflict. Both *Hines* and *Budney* are consistent with the principle that a State may recover from the estate of a Medicaid recipient's surviving spouse if it exercises its option under Section 1396p(b)(4)(B) to define the individual's estate more broadly than it is defined under state probate law. See *Hines*, 850 N.E.2d at 153-154 (explaining that the state legislature could have defined the recipient's estate in such a way as to provide for recovery of certain assets from the estate of his surviving spouse, but had chosen not to do so); *Budney*, 541 N.W.2d at 246 & n.2 (holding that a state statute authorizing full recovery from a surviving spouse's estate exceeded the State's authority under 42 U.S.C. 1396p(b), without considering whether it would have been permissible for the State to recover from the surviving spouse's estate the value of assets in which the recipient had an interest at the time of death). Respondent here, in any event, does not challenge the Minnesota Supreme Court's conclusion that a State is permitted to recover from the estate of a surviving spouse in some circumstances. See Br. in Opp. 6, 8-9, 19.

property, and other assets in which [the recipient] had any legal title or other interest *at his death*." *Wirtz*, 607 N.W.2d at 885 (emphasis added); see also *ibid.* ("Our inquiry * * * is * * * whether [the recipient] had 'real and personal property and other assets in which [he] had any legal title or interest *at the time of death*.") (emphasis added). Although its reasoning is not entirely clear, the court in *Wirtz* appeared to conclude that the recipient in that case, despite formal conveyance of certain assets before death, retained an interest in the relevant property until his death, when the interest was conveyed to his spouse through "other arrangement." 607 N.W.2d at 885 (quoting 42 U.S.C. 1396p(b)(4)(B)). The court did not elaborate on the nature of that interest, although it referred to the State's argument that the recipient had retained a "marital or equitable interest" in the assets at the time of his death, *id.* at 883, and noted that other courts had interpreted Section 1396p(b)(4)(B) to reach state-law community-property and homestead interests, *id.* at 885.

The different results reached by the North Dakota Supreme Court and the court below on similar facts thus may reflect not conflicting interpretations of federal Medicaid law, but only different views of when, under state law, a spouse retains a legal interest in property conveyed to his or her spouse. Compare *Wirtz*, 607 N.W.2d at 885-886, with Pet. App. 38a-40a (concluding that, after Ms. Barg transferred her interest in the homestead and bank accounts, she no longer had a legal interest that could have been conveyed to Mr. Barg upon her death), and *id.* at 40a (noting that Minnesota law "makes no reference to * * * re-defining the probate estate to include all marital property, even property transferred prior to death").

Even if the decisions in *Wirtz* and this case do reflect a disagreement as to proper interpretation of the Medicaid Act, this Court's review would not be warranted. The Minnesota Supreme Court's interpretation of federal law is correct, and to date, only the North Dakota Supreme Court has allowed Medicaid recovery following an inter vivos transfer of assets between spouses. Assuming arguendo that the North Dakota Supreme Court misunderstood federal Medicaid law, rather than simply applied a peculiar feature of its own property law, the North Dakota court has not had an opportunity to consider HHS's interpretation, and the conflict may work itself out as the issue is further addressed in the lower courts.

2. Although petitioner (Pet. 31-33) is correct that estate-recovery efforts are important to the Medicaid program, questions concerning the scope of the Act's estate-recovery provisions have not arisen frequently, and relatively few States have opted to seek estate recovery to the maximum extent permitted by federal law. See Office of Assistant Secretary for Policy & Evaluation, HHS, *Policy Br. No. 6, Medicaid Estate Recovery Collections* tbl. 4 (Sept. 2005) (only nine States make maximum use of federal policy options); see also Pet. 31.

Moreover, although the federal Medicaid Act limits estate recovery to those assets in which the Medicaid recipient had a legal interest at the time of her death, the nature and extent of such interests remain largely the domain of state law. Notably, Minnesota's Governor has proposed redefining marital property interests to permit recovery of medical assistance from the estate of the later-surviving spouse in this context. See *Governor's Recommendation, Minnesota State Budget, 2010-11 Biennial Budget, Human Services Dep't* 132 (Jan. 27,

2009). That proposal has not become law, nor has it been reviewed by the Secretary of HHS. The proposal, however, suggests that Minnesota may be able to work toward greater asset recovery consistent with the clear terms of federal Medicaid law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
TEAL LUTHY MILLER
Attorney

DAVID S. CADE
Acting General Counsel
JANICE L. HOFFMAN
Associate General Counsel
CAROL J. BENNETT
Deputy Associate General Counsel
LESLIE M. STAFFORD
BARBARA J. COLLINS
Attorneys
Department of Health and Human Services

MAY 2009